COMPENDIUM OF GRIEVANCE ARBITRATION DECISIONS

1988

Manitoba
Labour Board

MG-14005

91-02159/

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Note: In the following headnotes, the term "Board" refers to a three member arbitration panel, while the term "arbitrator" refers to a single arbitrator. The term "Board" should not be confused with The Manitoba Labour Board.

FILE NO. AA88-01-001

EMPLOYER: Motor Coach Industries Limited

UNION: International Association of Machinists and Aerospace Workers, Lodge 1953

ARBITRATOR: G.C. MacLean, Q.C.

APPEARANCES: K. Houston, for the Employer
L. Paulson, for the Union

ISSUES:
1. Seniority: Application of Seniority: Bumping 6:2330
2. Recall of Persons on Lay-off 6:2350
3. The Skill and Ability Requirement: Proof of Ability 6:3200

DECISION RENDERED: January 3, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: In January 1986, the Grievor, a Power Brake Operator, received a lay-off notice. To avoid the lay-off, he bumped into the position of General Power Machine Operator where he remained until he received another lay-off notice on March 24, 1986. On April 1, 1986, he bumped into the position of Partsman displacing an employee named "Mr. S." The Grievor was then bumped out of the position on April 30, 1986. Subsequently, the Grievor bumped into another Partsman position. He displaced "Mr. M.", who had just bumped into the position. Approximately four and one-half weeks as a Partsman and two days after his last bump, the Grievor was judged to be unable to perform the work of Partsman and was immediately laid off. The Employer recalled "Mr. S." to fill the position vacated by the Grievor.

The Union filed two grievances as a result of the lay-off. The first grievance alleged that the Employer had improperly laid off the Grievor. The Union argued that the lay-off was disciplinary in nature and that the Grievor should have been given five days' notice regarding his final lay-off. The second grievance, a policy grievance, alleged that the Employer improperly refilled the position vacated by the Grievor. The Union contended that "Mr. M.", who was senior to "Mr. S.", should have been recalled.

The Employer argued that the Grievor had been laid off due to his inability to perform the work. The decision to lay off the Grievor was delayed in order to allow the Grievor time to improve his productivity. As to its recall procedures, the Employer explained it treated a failed bump as if it had not occurred. Therefore, it would return the specific employee bumped from his or her position. The collective agreement did not contain a provision that dealt specifically with this special type of recall.

AWARD: The first grievance was denied. The Arbitrator did not view the Employer's actions as disciplinary. He was of the opinion that low productivity was one indicator of inability to perform. Therefore, the Arbitrator found that the Employer properly exercised its authority and was not obliged to give an employee additional notice if he was unable to do the job bumped into.

The second grievance was allowed. The Arbitrator agreed with the Employer that the collective agreement did not contain a provision for this special type of recall. He also agreed with the Employer's rule to recall the employee who was effected by the bump. However, the Arbitrator found that the rule was incorrectly applied, because "Mr. M." was the specific employee affected by the bump. He ordered that "Mr. M.", who was recalled earlier, be compensated for lost wages and benefits for the period of his lay-off.

AUTHORITIES: None cited

FILE NO. AA88-01-002

EMPLOYER: Winnipeg School Division, No. 1

UNION: Canadian Union of Public Employees, Local 110

ARBITRATOR: D.G. Baizley, Q.C.

APPEARANCES: G. Parkinson, for the Employer
M. Craddock, for the Union

ISSUES: 1. Discipline: Theft 7:3310
2. Discharge 7:3542

DECISION RENDERED: January 6, 1988

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Grievor, a Caretaker at one of the Employer's schools, was terminated from his position after a co-worker observed him placing three hockey sticks in his car. The Grievor claimed that he had pieced together three good sticks from a number of broken sticks he had found in the garbage. The Union filed a grievance alleging that the Grievor's employment was unjustly terminated.

AWARD: The grievance was denied. The Arbitrator found the Grievor's testimony to be inconsistent and improbable. Thus, the Arbitrator ruled that the termination was warranted, especially because of the absence of any mitigating factors.

AUTHORITIES: None cited.

FILE NO. AA88-01-003

EMPLOYER: Flin Flon General Hospital, Inc.

UNION: Manitoba Food and Commerical Workers, Local 832

ARBITRATOR: C.B. Cramer, Q.C.

APPEARANCES: R. Black, for the Employer
D. Primeau, for the Union

ISSUES:
1. Organization and Direction of the Workplace: Vacancies 5:2510
2. Job Posting 5:2520
3. The Collective Agreement: The Object of Construction: Intention of Parties 4:2100

DECISION RENDERED: January 11, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Union filed a policy grievance alleging that the Employer had not properly posted vacancies for the positions of Dietetic Aides. The Employer would post the position and include the job title and shift. However, the posting did not include a job description or listing of the job procedures. As well, the hourly rate was not specified. The Employer argued that the job procedure did not need to be posted because it only represented internal procedural guidelines.

AWARD: The grievance was allowed. The Arbitrator found that the wording in the collective agreement clearly required a posting to include the job position, the shift, the hourly rate of pay, and the qualifications for the position. Therefore, he ruled that the procedure used by the Employer was insufficient. The Arbitrator ordered that all future postings must include those items specified in the collective agreement.

AUTHORITIES: None cited.

FILE NO. AA88-01-004

EMPLOYER: Motor Coach Industries Limited

UNION: International Association of Machinists and Aerospace Workers, Lodge 1953

ARBITRATOR: D.E. Bowman, Q.C.

APPEARANCES: K.G. Houston, Q.C., for the Employer
L. Paulson, for the Union

ISSUES:
1. The Collective Agreement: Management Rights 4:2310
2. Management's Duty to Act Fairly 4:2320
3. Union Rights and Liabilities: Union Business on Company Time 9:1400
4. Discipline: Non-disciplinary Demotion 7:3546

DECISION RENDERED: January 14, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor was employed for 13 years as a Painter I. In May 1986, he became president of the union local. In this role, he was frequently required to be absent from his normal duties in order to deal with union business. In September 1986, a fellow employee informed him that he was being transferred because he would be spending a great deal of time away from work due to negotiations for a new collective agreement. The transfer was confirmed when the Grievor questioned his supervisor. He had received no formal notification and regarded the transfer as a demotion because the work was less demanding. The Union filed a grievance alleging that the Employer discriminated against the Grievor because of his Union activities.

The Employer recognized and accepted the need for the Grievor to be away from work to effectively represent the local. However, the Employer transferred the Grievor to a department where his absence would not have had as much of an impact upon the fulfilling of the production quotas. The Employer was of the view that it had not discriminated against the Grievor, because he received the same hours of work, rate of pay, and other benefits. As well, following the completion of negotiations, the Grievor, if he had asked, could have returned to his previous position.

AWARD: The grievance was denied. The Arbitrator commented that the Employer should have explained why the transfer was being contemplated, and perhaps his return could have been arranged following the negotiations. However, the Arbitrator found that there was no injury to the Grievor and no intent to distinguish injuriously. The Employer, under the collective agreement, was entitled to reassign employees to manage the work load. Thus, the Arbitrator found that the Grievor had not been discriminated against.

AUTHORITIES: None cited.

FILE NO. AA88-01-005

EMPLOYER: Asbestonos Corporation Ltd.

UNION: Canadian Association of Industrial, Mechanical and Allied Workers, Local No. 3

BOARD: J.M. Chapman, Q.C., Chairperson
J. Gibson, Nominee for the Employer
Prof. J. Silver, Nominee for the Union

APPEARANCES: D. Proctor, for the Employer
S. Spratt, for the Union

ISSUES:
1. Seniority: Lay-off 6:2200
2. Senior Employee with the Required Ability 6:3210
3. Jurisdiction of the Arbitrator: Improper Lay-offs 2:1425
4. The Collective Agreement: Management Rights 4:2310

DECISION RENDERED: January 14, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, an employee with 21 years of seniority, was laid off after reorganization of the corporation. He was informed that the Employer wanted to employ younger men who could perform a more flexible range of duties, and that there was no position available for him. The Union filed a grievance alleging a violation of article 4.01 of the collective agreement, because the Grievor was laid off out of seniority. As well, the Union submitted that work was available for the Grievor because an employee with only a few months of experience was performing the job previously performed by the Grievor.

The Employer argued that it had not violated the collective agreement, because under article 2.01 of the agreement, it had the right to direct the assignment of employees. Due to the reorganization and because the Grievor had made many mistakes in the past, the Employer viewed the Grievor as being incapable of performing the available work. The Union argued that, although the Grievor made errors, evidence proved that other employees had also. If the Grievor did not have the ability to perform the jobs assigned, then he would not have been able to keep his job for 21 years.

AWARD: The grievance was allowed. The Board concluded that, although the Grievor was not the best or most efficient employee, efficiency was not the test the parties had agreed upon for the lay-off procedure. Because the Grievor had performed the job for so many years and because of article 4.01 of the collective agreement, the Board found that the Grievor was improperly laid off and ordered him reinstated without loss of benefits, seniority, or salary.

DISSENT: J. Gibson, Nominee for the Employer. Reasons were not submitted.

AUTHORITIES: Brown & Beatty, Canadian Labour Arbitration, (2nd ed.) p. 308; and others.

FILE NO. AA88-01-006

EMPLOYER: Atomic Energy of Canada Limited

UNION: The International Association of Machinists and
Aerospace Workers, Lodge 608

BOARD: M.H. Freedman, Q.C., Chairperson
H.G. Piercy, Nominee for the Employer
D. Atkinson, Nominee for the Union

APPEARANCES: P. Kremer, for the Employer
L. Paulson, for the Union

ISSUES: 1. Seniority: The Skill and Ability Requirement: Senior Employee if Relatively Equal 6:3220
2. Ability and Qualification Criteria 6:3300

DECISION RENDERED: January 20, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, who had 17 years of seniority, applied for the position of Leadhand Industrial Mechanic (Millwright). An employee who was less senior to him was the successful applicant. The Union filed a grievance alleging that the Employer had violated article 12 of the collective agreement, which stipulated that seniority was to be the deciding factor in promotions, transfers and appointments when skill and experience were equal.

According to the Employer, it was looking for a future supervisor, and the successful candidate's supervisory skills exceeded the Grievor's. As well, the successful candidate had a broader background than the Grievor, and had double the years experience as a Millwright. The Employer was of the opinion that the successful candidate was more willing to work overtime than was the Grievor.

The Union stated that the evidence proved that the Grievor had the necessary skill, experience, and capacity to perform the required task, and that his qualifications were equal to the successful candidate's. It argued that the interview evaluation was subjective and arbitrary. As well, the evidence presented by the Employer did not substantiate that the Grievor was significantly less willing to work overtime than was the successful candidate. In addition, the Employer's statement that it was looking for a supervisor and not a tradesman demonstrated that a different position was filled than was described in the posted bulletin.

AWARD: The grievance was allowed. The Board agreed with the Employer that seniority was a factor only when other factors were equal. Based upon the testimony of the Employer, the Board ruled that the relative skill, experience, and capacity of the Grievor and of the successful candidate were "close." Therefore, seniority should have been considered. Thus, the Grievor should have been chosen for the position.

DISSENT: H.G. Piercy, Nominee for the Employer. The Employer stated that it was looking for an individual who was a competent tradesman and who was best suited to perform the supervisory duties as set out in the job description. Mr. Piercy pointed out that the evidence given by the Employer, which was presented out of context in the majority award, summarized that "one man stood out - he was better qualified." Mr. Piercy felt that the Grievor did not establish that his skills, especially his supervisory skills, were equal to the successful candidate's. Thus, Mr. Piercy would have dismissed the grievance.

AUTHORITIES: Re United Automobile Workers and Westeel Products Ltd., 11 L.A.C. 199; Re Textile Workers Union and Lady Galt Towels Ltd., 20 L.A.C. 382; and Re Northern Telecom Ltd. and United Automobile Workers, Local 1839, 25 L.A.C. (2nd) 379.

FILE NO. AA88-01-007

EMPLOYER: Brandon General Hospital

UNION: Brandon Nurses MONA, Local 4

BOARD: J.M. Chapman, Q.C., Chairperson
R. Simpson, Nominee for the Employer
D. Shrom, Nominee for the Union

APPEARANCES: G.D. Parkinson, for the Employer
R. Deeley, for the Union

ISSUES:
1. Seniority: The Skill and Ability Requirement: Ability and Qualifications Criteria 6:3300
2. Application of Seniority: Job Posting 6:2310
3. The Collective Agreement: Management's Duty to Act Fairly 4:2320
4. Subsection 69.2 (amended s. 80) of The Labour Relations Act

DECISION RENDERED: January 28, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, who was a Registered Nurse, had been employed for approximately ten years with the Employer. She applied for a 0.6 full-time nursing position in the nursery ward. The successful applicant was a casual nurse, who had no seniority. The Union filed a grievance alleging that the Employer had violated the collective agreement by awarding the position to a candidate with no seniority. The Union also alleged that the posting and selection process was invalid, because the Employer did not choose the criteria in good faith. It submitted that the qualifications which the Employer required for nurses in the nursery were inconsistent. Also, it argued that the requirement for a post graduate education was unrealistic, especially since the Head Nurse did not possess that qualification. The Union also alleged that there was a possibility of bias, because the successful candidate was married to a doctor in the hospital. As well, everyone in authority knew she was the only candidate who had a post graduate education. Finally, the Union emphasized that the Grievor had been assigned to the nursery in the past. Therefore, the Employer knew that she was capable of performing the work.

The Employer stated that, of the four applicants for the position, only the successful candidate had the required experience and post graduate educational qualifications. Further, the Grievor had not met the criteria for the required years of experience in neonatal care. The Employer was entitled to seek the best qualified persons, no matter how difficult they were to find.

AWARD: The grievance was denied. From the evidence, the Board was not prepared to conclude that either party acted in bad faith. It was of the view that the Grievor had not met one of the basic qualifications for the position. It was also unable to find that the criteria were unreasonable. However, it did find a complete lack of consistency in the job postings, and gratuitously recommended the Employer review its posting process.

DISSENT: D.M. Shrom, Nominee for the Union. Mr. Shrom had reservations as to whether the seniority of the Grievor was given proper and judicious consideration, but did agree that the Grievor had not met the required qualifications. However, he would have allowed the grievance in part because of the improper job posting and selection process, which was in violation of the collective agreement and section 69.2 of The Labour Relations Act. Therefore, Mr. Shrom would have required that the posting and selection process be redone properly.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-02-001

EMPLOYER: The Churchill Health Centre

UNION: Manitoba Organization of Nurses Association

BOARD: S.G. Sigurdson, Q.C., Chairperson
R.A. Simpson, Nominee for the Employer
D. Shrom, Nominee for the Union

APPEARANCES: G.D. Parkinson, for the Employer
R.K. Deeley, for the Union

ISSUES:
1. Jurisdiction of the Arbitrator: The Collective Agreement 2:1200
2. Limits to the Arbitration of Grievances: Arbitrability 2:300
3. Union Rights: Recognition 9:1100
4. Compensation: Fringe Benefits (Housing Policy) 8:3000
5. Subsection 69.2(2) (amended s. 80(2)) of The Labour Relations Act

DECISION RENDERED: February 2, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The nurses employed at the Churchill Health Centre were advised by letter of certain rental increases and the introduction of damage and key deposits in respect to the housing units which they rented from the Employer. The Union grieved that the Employer had violated the collective agreement because it had altered its "housing allocation" policy, which resulted in a reduction and loss of a benefit and privilege to which the nurses were entitled. The Union argued that the magnitude of the increase was unfair. In addition, it stated that the timing of the increase was unfair as the term of the collective agreement was only two-thirds completed. Finally, the Union argued that the Employer's actions were tantamount to the Employer negotiating directly with the employees. Therefore, the collective agreement was violated, because the Union was cited as sole bargaining agent for the nurses.

The Employer retorted that it did not act unfairly, because two representatives of the Union sat on the committee that formulated the new rental rules and regulations. Moreover, the Employer argued that the Union was requesting the Arbitration Board to determine whether the rental increase was fair. Therefore, the Board was being asked to regulate something outside the collective agreement and outside its jurisdiction. As well, The Rent Review Act exempted premises administered by government, so the Board was asked to determine what the Legislature had said should not be done.

AWARD: The grievance was denied. The Board ruled that it did not have the jurisdiction to rule over rental matters. Even if the Board had the jurisdiction, it could not determine if the increases were reasonable from the evidence that was presented. The Board concluded that the parties had intended rental matters to be dealt with during the bargaining process, and not as an arbitrable issue. If intended otherwise, the collective agreement would have contained clear wording to allow the Board to review rent increases. The existence of the ad hoc committee was further proof that this matter was a bargaining issue. Finally, the Board considered that the rules and regulations were arrived at fairly, because representatives of the Union sat on the committee.

DISSENT: D. Shrom, Nominee for the Union. Mr. Shrom stated that the Board was not asked to legislate a housing policy or to determine if the rent increase or timing was fair. Rather, it was asked to determine if the collective agreement was violated. The collective agreement contained an article that limited the Employer's rights to imposing rules and regulations. The Employer had violated this article because it unilaterally introduced changes to the "housing policy." Therefore, Mr. Shrom would have allowed the grievance.

AUTHORITIES: None cited.

FILE NO. AA88-02-002

EMPLOYER: Dauphin General Hospital; and,
Dauphin Personal Care Home Inc.

UNION: Dauphin General Hospital Nurses MONA, Local 25

BOARD: J.M. Chapman, Q.C., Chairperson
R. Whiteway, Nominee for the Employer
C. Derham, Nominee for the Union

APPEARANCES: G.D. Parkinson, for the Employer
R.K. Deeley, for the Union

ISSUES:
1. Organization and Direction of the Work Place: Scheduling Work: Persons Normally Performing the Work 5:3222
2. Remedies 5:3240
3. Proprietary Rights to Overtime Assignments 5:3220

DECISION RENDERED: February 10, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, who was a part-time nurse, had indicated to the Employer that she wished to work additional shifts. On the day in question, she received a call from another nurse who asked the Grievor to trade shifts with her. The Grievor replied that she was unable to work. Ten minutes later, she contacted the other nurse to inform her that her plans had changed and she would be able to work. However, the other nurse had already phoned in sick. Conflicting evidence was given by the Grievor and the other nurse regarding the conversation of the second call. The other nurse testified that she had told the Grievor that she had informed the Employer that the Grievor was unavailable. Conversely, the Grievor testified that the other nurse said she had not informed the Employer. Nevertheless, the Employer did not contact the Grievor. The next morning, the Grievor spoke with the Head Nurse and was informed that a casual nurse had worked the shift. The Union filed a grievance alleging that the Employer had violated article 3402 of the collective agreement, which required the Employer to give part-time nurses preference over a casual nurse for any additional shifts.

The Employer argued that the Grievor had an obligation as per article 3402 to "make known" her availability for occasional shifts. In this case, she should have contacted the Employer, especially because she knew that the other nurse was not working her scheduled shift.

The Union stated that the evidence had shown the Grievor did not fail to make known her desire to work extra shifts, and that she was always contacted by the Employer when an additional shift was available. It further argued that the onus was on the Employer to confirm if the Grievor was available, and the Employer should not have relied on secondhand information from another nurse.

AWARD: The grievance was allowed. The Board found that the Grievor had made known her desire to work. The Board ruled that the Employer should not have relied upon secondhand information on the availability of the Grievor. Because the Employer had contacted a casual nurse and not the Grievor, it had violated the collective agreement. Although the Board ruled in the Grievor's favour, it stated that she did not act in the most prudent manner, because she could have called the hospital herself. The Board directed that the Grievor be compensated for the additional shift on the basis of straight time.

DISSENT: C.W. Derham, Nominee for the Union. Mr. Derham concurred with the majority of the award. However, he pointed out that there was no onus on the Grievor to call the Employer, because she had clearly made known her desire to work additional shifts.

R. Whiteway, Nominee for the Employer. Mr. Whiteway stated that the Grievor, in essence, had told the Employer that she was unavailable for a particular shift, because she did not contact the Employer once she was told that the Employer was informed of her unavailability. Therefore, he would have dismissed the grievance.

AUTHORITIES: Re International Brotherhood of Boilermakers, etc., and Howden & Parsons (Canada) Ltd., 21 L.A.C. 177.

FILE NO. AA88-02-003

EMPLOYER:	Valleyview Co-op Ltd.
UNION:	Manitoba Food & Commercial Workers, Local 832
ARBITRATOR:	J.M. Chapman, Q.C.
APPEARANCES:	D. Pratt, for the Employer D. Primeau, for the Union
ISSUES:	1. The Collective Agreement: The Object of Construction: Intention of the Parties 4:2100 2. Compensation: Daily Overtime 8:2110
DECISION RENDERED:	February 10, 1988
EXPEDITED ARBITRATION:	Yes

CIRCUMSTANCES: The Grievor, who was employed part-time, worked a schedule which varied from week to week. During the week in question, the Grievor worked a five-hour shift every evening from Monday to Saturday. On the Sunday, he worked for eight hours. He received double time for one of the five-hour shifts, but not for the Sunday shift. The Union filed a grievance alleging that the Employer had violated article 23 of the collective agreement, because the Grievor had not received the appropriate double-time rate of pay for all hours worked on Sunday. Article 23 stated that employees were to receive double the rate of pay for all hours worked on Sunday or the day given in lieu of Sunday. The Union interpreted the article to allow for all employees to receive double the rate of pay for all hours worked on Sunday.

The Employer argued that if it was the intention of the parties to have employees paid double time for all hours worked on Sunday then there would have been a period after the word "Sunday" in article 23. However, the parties added the qualifying words "or the day given in lieu of Sunday." The Employer added that the Grievor worked on Sunday on a regular basis and was not given a specific day off in lieu of Sunday.

AWARD: The grievance was denied. The Arbitrator accepted the Employer's interpretation of the article. If the parties had intended employees who worked on Sundays to receive double time, a separate clause would have been included in article 27 on premium rates.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-02-004

EMPLOYER: Health Sciences Centre

UNION: Manitoba Association of Health Care Professionals

ARBITRATOR: J.M. Chapman, Q.C.

APPEARANCES: W.S. Gardner, for the Employer
P. Teskey/K. Lercher, for the Union

ISSUES:
1. Seniority: The Scope of Arbitral Review 6:3100
2. Senior Employee if Relatively Equal 6:3220
3. Organization and Direction of the Work Place: Job Posting 5:2520
4. The Collective Agreement: Management's Duty to Act Fairly 4:2320
5. Subsection 69.2(2) (amended s. 80(2)) of The Labour Relations Act

DECISION RENDERED: February 10, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, who was employed as a Technologist II, unsuccessfully applied for the position of Technologist IV. The Union filed a grievance alleging that the Employer had violated the collective agreement, because the position was not awarded to the Grievor who was the most senior and who, in the opinion of the Union, was qualified to receive the position. The Grievor's education and qualifications satisfied the criteria set out in the job posting, which did not require the successful applicant to be aggressive, innovative, or to possess leadership skills. The Union also contended that the Employer was acting unfairly and arbitrarily, because it had not made the selection criteria known to the candidates and interviews were not held.

The Employer stated that there was no evidence to establish relative equality between the Grievor and the successful candidate. The Grievor was currently employed in a highly automated laboratory, whereas the vacancy was in a laboratory where manual procedures were predominate. As well, his work performance had deteriorated, as evident from his evaluations, and he lacked the leadership and communication skills necessary. The Employer also argued that evidence did not exist to indicate that the selection criteria, which were provided to the Union, were unreasonable, or that the selection procedure was unfair, discriminatory, or exercised in bad faith. In addition, the collective agreement did not require the selection committee to hold interviews.

AWARD: The grievance was allowed in part. The Arbitrator found that evidence was not produced to demonstrate if the Grievor and the incumbent were relatively equal in abilities. In addition, he found that the Employer had not complied with the collective agreement, because it had not publish the selection criteria. Even though he could not find that the conduct of the Employer was fair and impartial, he was not prepared to set aside its final decision. Thus, the Arbitrator directed that the matter be remitted back for a new determination and all the criteria to be considered by the selection committee were to be specified. It was beyond the Arbitrator's jurisdiction to specify that interviews be conducted, but he ordered that, if the Grievor was selected, the appointment was to be retroactive to the time of the first appointment.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-02-005

EMPLOYER: Westfair Foods Ltd.

UNION: Manitoba Food & Commercial Workers, Local 832

ARBITRATOR: G.D. Parkinson

APPEARANCES: R. Roy, for the Employer
R. Tonn, for the Union

ISSUES:
1. Discipline: Discharge 7:3542
2. Attendance at Work 7:3100
3. Refusal to Follow Instructions 7:3610
4. Compensation: Scheduling Vacations 8:3240
5. Inability to Discharge Employment Obligations 7:3220

DECISION RENDERED: February 12, 1988

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Grievor was employed as a part-time cashier. As a new employee, she was not entitled to vacation time during her first year of employment. At the time of her hiring, the Grievor did not inform the Employer of her plans to go on vacation. When she did request time off for two weeks, her request was denied. As advised by the Union, the Grievor submitted a statement restricting her availability to Sundays, a day when the store was not open. The

Employer interpreted the statement as a notice of resignation. On the date the request was effective, the Grievor was told that that was her last shift. Because the Grievor never intended to quit, the Union filed a grievance alleging that the Grievor was unjustly terminated.

AWARD: The grievance was denied. The Arbitrator found that the Grievor's problem was not handled well by the Employer. He would have ruled that the discharge was unjustified, except the Grievor admitted that, regardless of the Employer's position, she would go on her holiday. Although the Union claimed that the Grievor had a right to vacation time, she did not have the right to unilaterally declare when the time could be taken. In this instance, she did not pursue her entitlement to vacation, but filed a declaration restricting her availability. Due to the Grievor's short term of service, her youth, her lack of dependents, and because she had found alternate employment, the Arbitrator would not alter the Employer's decision to terminate the Grievor.

AUTHORITIES: None cited.

FILE NO. AA88-02-006

EMPLOYER:	Somerville Belkin Industries Ltd.
UNION:	The Canadian Paperworkers Union, Local 341
ARBITRATOR:	G. Reid
APPEARANCES:	G.B. Smith, for the Employer C. Monk, for the Union
ISSUES:	1. Seniority: Promotion, Demotion, and Transfer 6:2100 2. Senior Employee if Relatively Equal 6:3220 3. The Collective Agreement: Intention of the Parties 4:2100
DECISION RENDERED:	February 18, 1988
EXPEDITED ARBITRATION:	Yes

CIRCUMSTANCES: The Grievor, who was a Class C finishing worker, was demoted for one week due to a reduction in available work. An employee junior to him also was temporarily reassigned, but to a higher classified position. The Union filed a grievance alleging that clause 15.01 of the collective agreement was violated, because the Grievor's seniority was not considered during the reassignment of duties.

AWARD: The grievance was allowed. The Arbitrator found that the key phrase, "substantially the same", in clause 15.01 made the meaning of the clause ambiguous. As the meaning was unclear, the Arbitrator applied a conservative view of seniority. That is, if more than one employee possessed the skills necessary to perform a particular job, the senior employee should receive it. Although the junior employee was better qualified and possessed better working habits than the Grievor, the Grievor was still capable of performing the work.

AUTHORITIES: Re Tung-Sol, 15 L.A.C. 161 at 162; Palmer, Collective Agreement Arbitration in Canada, (2nd ed.) p. 387; and Canadian Trailmobile Ltd. and United Auto Workers, Local 397, 1975, 10 L.A.C. (2nd) pp. 92-104.

FILE NO. AA88-02-007

EMPLOYER: Royal Canadian Legion Fort Rouge, Branch No. 97

UNION: Canadian Association of Industrial, Mechanical and Allied Workers, Local 1

BOARD: J.M. Chapman, Q.C., Chairperson
J. Gibson, Nominee for the Employer
Prof. J. Silver, Nominee for the Union

APPEARANCES: D. Proctor, for the Employer
S. Soronow, for the Union

ISSUES:
1. Organization and Direction of the Work Place: Assignment of Bargaining Unit Work to Non-Unit Employees 5:1400
2. Assignment of Work Outside the Bargaining Unit: Managers 5:1127
3. The Collective Agreement: Management Rights 4:2310
4. Management's Duty to Act Fairly 4:2320
5. Subsections 1(k), 69.2(2) (amended s. 80(2)), and 109(1) (amended s. 121(1)) of The Labour Relations Act and section 13 of The Interpretation Act

DECISION RENDERED: February 19, 1988
(Interim Award - January 8, 1988)

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Employer had raised a preliminary objection stating that the matter was not arbitrable, because management had not violated the collective agreement. The Board issued an Interim Award in which it had ruled that the matter should proceed because there was an alleged violation. The onus was then on the Union to prove that a violation had occurred.

The Union alleged that the Employer had violated the collective agreement, because bargaining unit work was assigned to the Head Bartender, who was excluded from the bargaining unit. She performed a number of management duties, but she worked primarily as a bartender. As a result, the Union contended that the Grievors had been deprived of work and shift preferences, especially the one who was senior to the Head Bartender.

AWARD: The grievance was denied. The Board found that the duties of the Head Bartender had not changed since the date of certification. Seniority did not apply in this case, since the Head Bartender was excluded from the bargaining unit as stated in the certificate issued by the Manitoba Labour Board, an exclusion to which the Union specifically agreed. As well, the collective agreement did not contain any restrictions on the right of the Employer to assign bargaining unit work.

DISSENT: Prof. J. Silver, Nominee for the Union. Although the collective agreement did not contain a specific prohibition for management assigning bargaining unit work to non-bargaining unit employees, jurisprudence set out a second test. If the Union established that the work assigned to employees outside the bargaining unit was substantial in extent and nature, then management was in contravention of established jurisprudence. The Union had agreed to exclude the Head Bartender from the bargaining unit, because she performed management functions. It did not agree that she should spend close to one hundred percent of her time performing bargaining unit work. Thus, Prof. Silver would have allowed the grievance.

AUTHORITIES: None cited.

FILE NO. AA88-02-008

EMPLOYER: Manitoba Hydro

UNION: International Brotherhood of Electrical Workers, Local 2034

BOARD: J.M. Chapman, Q.C., Chairperson
E.W. Olson, Q.C., Nominee for the Employer
R. Tonn, Nominee for the Union

APPEARANCES: G.D. Parkinson, for the Employer
P. Teskey/K. Lercher, for the Union

ISSUES:
1. Seniority: Senior Employee with the Required Ability 6:3210
2. The Skill and Ability Requirement: Aptitude 6:3330

DECISION RENDERED: February 22, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, who was an Assistant District Operator II, was seeking to become an Assistant District Operator III. The successful candidate had less seniority than the Grievor, who had many years of seniority with the Company, but in a rural rather than in an urban district. The new position, which was in Winnipeg, required a higher level of responsibility than at his previous posts. The Employer informed the Grievor that he was not ready for that much responsibility and he had not had sufficient training. Subsequently, the Union filed a grievance alleging that the Employer violated article 11.1 of the collective agreement, which stated that the employee with the most seniority would be awarded the position, provided he met the minimum requirements and qualifications for the position.

The Employer agreed that the Grievor had the skill and experience to perform most of the duties of the position, but he had demonstrated that he had difficulties in planning, initiative, and productivity. The Employer pointed out that one of the relevant portions of article 11.1 was "past performance", and the Grievor's record had not been satisfactory.

The Union argued that the Grievor had shown initiative, as he had enrolled in courses. As well, he had successfully applied for various promotions. If the Employer had real concerns regarding the Grievor, then it would not have granted him the promotions and transfers.

AWARD: The grievance was allowed. The Board found that the Grievor had been promoted in the past, and had demonstrated some initiative, because he had tried to take courses offered by the Employer. In addition, after reviewing the qualifications for the Grievor's current position and the Assistant District Operator III position, the Board found that the Grievor had performed the duties of and had the required qualifications for the position. Therefore, the Board ruled that the Grievor met the requirements including the minimum qualifications for the position. Thus, the Board ruled that the threshold clause of the collective agreement was violated, and ordered that the Grievor receive the position.

DISSENT: E.W. Olson, Q.C., Nominee for the Employer. Mr. Olson did not view the Grievor's current position and the position he had sought to be equivalent, because the latter required the ability to plan, to organize, and to supervise personnel. These qualifications were not required in the Grievor's current position. As well, the Grievor's past performance was not satisfactory in those areas. Therefore, Mr. Olson was of the opinion that the Employer had made a reasonable decision, and he would have dismissed the grievance.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-02-009

EMPLOYER:	The Rural Municipality of Louise
UNION:	The International Union of Operating Engineers, Local 901
ARBITRATOR:	L. Cherniack
APPEARANCES:	D. Newman, for the Employer J. Murphy, for the Union
ISSUES:	1. The Collective Agreement: Intention of the Parties 4:2100 2. Management Rights 4:2310 3. Jurisdiction of the Arbitrator: Improper Lay-offs 2:1425 4. Subsection 69.2(2) (amended s. 80(2)) of The Labour Relations Act and subsection 163(2) of The Municipal Act
DECISION RENDERED:	February 23, 1988
EXPEDITED ARBITRATION:	Yes

CIRCUMSTANCES: The Employer had laid off all of its employees for one month due to a lack of work. The Union filed a grievance alleging that the Employer had violated the collective agreement, and in particular, the letter of understanding on normal hours of work. The Union argued that a forty-hour work week was established and was to be maintained unless operational requirements changed, which they had not in this case. Thus, by shutting down the operation, the Employer had breached the collective agreement and had not acted reasonably, fairly, or in good faith.

The Employer contended that article 17.04 of the collective agreement required notice of lay-offs to be given except in the event of a lay-off due to a lack of work or inclement weather. Also, the Employer cited some arbitration cases which found that the clause, "normal hours of work", did not constitute a guarantee of those hours.

AWARD: The grievance was denied. The Arbitrator found that the collective agreement allowed for lay-offs without notice for lack of work. The evidence had shown that there was a lack of work on the date of the shut-down. Therefore, the Employer's actions were consistent with the collective agreement, and it had not acted unreasonably, unfairly, or in bad faith.

AUTHORITIES: None cited.

FILE NO. AA88-02-010

EMPLOYER: Burns Meats

UNION: United Food & Commercial Workers International Union, Local 111

BOARD: J.M. Chapman, Q.C., Chairperson
R.A. Simpson, Nominee for the Employer
B. Malazdrewich, Nominee for the Union

APPEARANCES: G.D. Parkinson, for the Employer
M. Myers, Q.C./D. Macri, for the Union

ISSUES:
1. The Arbitration Process: Preliminary Objections 3:2100
2. The Collective Agreement: Management Rights 4:2310
3. Seniority: Reduction of Hours 6:2210
4. Compensation: Wage Guarantees 8:1200
5. Subsection 109(1) (amended s. 121(1)) of The Labour Relations Act and section 13 of The Interpretation Act

DECISION RENDERED: February 24, 1988
(Interim Award - January 14, 1988)

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: At the outset of the hearing, the parties apparently were not in agreement as to the nature of the grievance. The Employer raised a preliminary objection that the matter the Union grieved was, therefore, not before the Board. In an interim award, the Board ruled that pursuant to subsection 109(1) of The Labour Relations Act, an arbitration board should not have undue regard to "strict legal interpretation", and therefore, the matters in dispute, as raised by the Union, could be heard by the Board.

The Employer laid off a varying number of employees on consecutive Mondays for a seven-week period. The affected employees worked the remainder of the week and were compensated for time worked. As a result, they were paid for a thirty-two-hour work week. The Union filed a grievance alleging that the Employer violated article 9 of the collective agreement, which dealt with a thirty-seven-hour pay guarantee. In addition, the Union contended that the Employer did not properly administer the lay-offs because seniority was not taken into account on a plant-wide basis.

The Employer argued that article 9.1 did not guarantee a thirty-seven hour work week. As well, it disagreed that seniority had been violated, because evidence had not shown that any junior employee had worked while employees were laid off. In addition, the management rights clause gave it the authority to decide what work it wanted done and when. Work was not available on the Mondays, due to an undisputed shortage of cattle. Further, the Employer argued that it was not estopped from laying off employees, because similar lay-offs had occurred in the past, although at the end of the work week.

AWARD: The grievance was denied. From the evidence presented, the Board could not find fault with the Employer's actions with respect to the lay-offs. As well, seniority was scrupulously adhered to in this situation. The Board ruled that the employees were not guaranteed thirty-seven hours of pay when on lay-off notice. The Board found that the Employer did not violate the collective agreement, because there was a bona fide work shortage and the most junior employees were sent home.

AUTHORITIES: Seagrams Employees and Distillery, Brewery, Winery, Soft Drink and Allied Workers Union, Local 604, and B.C. Distillery Company Limited, C.L.R.B. Reports; and Brown & Beatty, Canadian Labour Arbitration, (2nd ed.) p. 280.

FILE NO. AA88-03-001

EMPLOYER: Bristol Aerospace

UNION: The Canadian Association of Industrial, Mechanical and Allied Workers, Local 5

BOARD: J.M. Chapman, Q.C., Chairperson
R.A. Simpson, Nominee for the Employer
Prof. J. Silver, Nominee for the Union

APPEARANCES: G.D. Parkinson, for the Employer
S.I. Soronow, for the Union

ISSUES:
1. Discipline: Discharge 7:3542
2. Insubordination 7:3600
3. Insolent, Unco-operative Behaviour, Obscene Language 7:3660
4. Disciplinary Penalties: The Doctrine of Culminating Incident 7:4310
5. Union Officials 7:4320

DECISION RENDERED: March 4, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, who was the Union Shop Steward, approached the department Lead Hand and alleged that a probationary employee was being unjustly treated. The Grievor lost his temper and began to verbally abuse the Lead Hand. As a result of this incident and the Grievor's previous record of harassing and threatening fellow employees, the Grievor was discharged. The Union filed a grievance alleging that the Grievor's employment was unjustly terminated. It argued that, as Shop Steward, the Grievor would naturally come into conflict with management. As well, swearing was common on the shop floor; the Grievor's past performance appraisal was satisfactory; and the incident in question was not significant, and could not be viewed as a culminating incident.

The Employer argued that the incident was the culminating incident, because the Grievor had a history of threatening the safety and well-being of employees, of continuously challenging authority, and of insubordination. The Grievor was not acting as the Shop Steward in this case, because mention of a grievance was never made. At the time of the termination, the Employer gave the Union the opportunity to produce evidence that the allegations made against the Grievor were not true. The Union did not produce such evidence, and the Grievor refused to apologize to the Lead Hand.

AWARD: The grievance was denied. The Board was satisfied that the Grievor was not acting in the capacity of Shop Steward and was not advancing a grievance. As well, the Board found that the Grievor caused the incident and had acted in an unjustified and unreasonable manner. The Board ruled that the incident did merit discipline, because the Grievor was guilty of insubordination. The Employer had acted fairly, because it had allowed the Union an opportunity to present evidence, but none was brought forward. In view of the absence of an apology and the Grievor's past record, the Board ruled that this was a culminating incident and the Employer did comply with the principles of progressive discipline.

DISSENT: Prof. J. Silver, Nominee for the Union. Prof. Silver would not have accepted much of the Grievor's previous disciplinary record as evidence, because the Grievor was unaware of its existence. This is one of the conditions of the doctrine of culminating incident. As well, Prof. Silver questioned the credibility of the witnesses who testified for the Employer. Therefore, this evidence should not have been accepted. Finally, the incident in question did not warrant a dismissal. Therefore, Prof. Silver would have allowed the grievance.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-03-002

EMPLOYER: Town of Dauphin

UNION: Canadian Union of Public Employees, Local 857

ARBITRATOR: C.B. Cramer, Q.C.

APPEARANCES: D.J. Pratt, for the Employer
W. Smith, for the Union

ISSUES:
1. Organization and Direction of the Work Place: Changes in Job Function 5:2410
2. Revision of Classification and Rates 5:2440

DECISION RENDERED: March 11, 1988

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Grievors, three R.C.M.P. stenographers, testified that, since the R.C.M.P. had computerized its operations, their jobs had changed and had expanded from the duties listed in their job descriptions. The Union filed a grievance on behalf of the Grievors alleging that the Employer had violated article 2402 of the collective agreement, because it had changed and had increased the duties and volume of work, while not adjusting the Grievors' salaries.

The Employer agreed that the volume of work had increased, but the situation was quickly alleviated by the hiring of a part-time person to help reduce the workload.

AWARD: The grievance was allowed. From the evidence, the Arbitrator found that the job had changed and had expanded from the job description. Although the Employer had made a sincere attempt to alleviate the workload by employing a part-timer, the Grievors were allowed relief only from simpler tasks on certain days. The Arbitrator ruled that a salary increase was justified and ordered the Employer to pay the Grievors at the level of Utility Clerk effective from the date the grievance was filed.

AUTHORITIES: None cited.

FILE NO. AA88-03-003

EMPLOYER: The Province of Manitoba

UNION: The Manitoba Government Employees' Association

ARBITRATOR: G.D. Parkinson

APPEARANCES: O. Zabloski, for the Employer
T. Turcan/L. Morrisseau, for the Union

ISSUES:
1. Discipline: Discharge 7:3542
2. Production and Attendance Records 7:3322
3. Mitigating Factors 7:4400
4. Compensation: Illness: Benefits and Other Rights 8:3300

DECISION RENDERED: March 11, 1988

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Grievor, who had a poor attendance record, submitted forged medical certificates on two separate occasions with the intent of getting paid sick leave benefits for days on which he would not be entitled to sick pay. The Grievor was discharged when the Employer became aware of his actions. The Union filed a grievance on behalf of the Grievor arguing that the punishment was too harsh, as he was experiencing extreme financial difficulties and was under stress when he submitted the forged documents.

AWARD: The grievance was denied. The Arbitrator found that the Grievor had knowingly obtained blank medical certificates for later use. Therefore, the Arbitrator could not accept the Grievor's claim that his actions were spontaneous. Although the Arbitrator sympathized with the Grievor's plight of unemployment and financial hardship, he could not find in the Grievor's favour, especially in view of his poor attendance record.

AUTHORITIES: Re Forrester and Treasury Board (Post Office Dept.), 2 L.A.C. (3d) 182.

FILE NO. AA88-03-004

EMPLOYER: Beverage Services Ltd.

UNION: 1331 Beverage Workers Association

ARBITRATOR: M.H. Freedman, Q.C.

APPEARANCES: W.D. Hamilton, for the Employer
M. Myers, Q.C./D. Macri, for the Union

ISSUES:
1. Organization and Direction of the Work Place: Job Vacancies 5:2510
2. Seniority: Application of Seniority: Job Posting 6:2310
3. Senior Employee with the Required Ability 6:3210
4. Remedial Authority of the Arbitrator: Promotions 6:4100

DECISION RENDERED: March 14, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, who had been employed for two years on a full-time basis, had applied for the position of Sanitizer. The Grievor was not interviewed for the position and was informed by the Employer that the position had been awarded to an individual who was not employed with the company. The Union filed a grievance alleging a breach of articles 12:04 and 12:05 of the collective agreement. These articles dealt with job postings and the filling of vacancies. Under article 12:05, current employees were to receive first consideration for a vacancy or new position.

The Employer was of the opinion that the successful candidate was more qualified for the position than the Grievor, based upon education and past experience. The Employer was under no obligation to interview the Grievor, because he had been interviewed in the past.

The Union argued that the Grievor should have received first consideration, rather than being compared to the successful candidate. As well, the Union argued that the decision process was arbitrary, because the Grievor was not interviewed while the incumbent was interviewed twice. Moreover, because the incumbent had no seniority, under article 12:05 of the collective agreement, he did not qualify for the position. The Union was of the opinion that the Grievor could perform the duties of a Sanitizer and was at least as capable as the successful candidate. As the Employer usually appointed from within, changing the policy in this case would be discriminatory and arbitrary.

AWARD: The grievance was allowed. The Arbitrator found that the Employer was in breach of the collective agreement because it had not given the Grievor "first consideration." From the evidence presented, the Arbitrator was satisfied that the Grievor was capable of performing the job. Therefore, the Arbitrator directed that the Grievor be appointed to the position of Sanitizer retroactive to the date when he should have been appointed.

AUTHORITIES: Re United Automobile Workers and Westeel Products Ltd., 11 L.A.C. 199 at 200; Re Textile Workers Union and Lady Galt Towels Ltd., 20 L.A.C. 382 at 385; and Re Toronto Star Ltd. and Toronto Newspaper Guild, Local 87 (1976) 12 L.A.C. (2d) 148.

FILE NO. AA88-03-005

EMPLOYER: Westman Regional Laboratories Inc.

UNION: Manitoba Association of Health Care Professionals

ARBITRATOR: J. Atwell

APPEARANCES: Not Stated

ISSUES:
1. Organization and Direction of the Work Place: Changes in Job Function 5:2410
2. Criteria: Equal Work or Equal Skill 5:2420
3. Revision of Classifications and Rates 5:2440

DECISION RENDERED: March 17, 1988

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Grievor, who was a Cytotechnologist I (Tech I), claimed that the scope of her duties and responsibilities were not consistent with the classification. She requested a reclassification, but it was denied. As a result, the Union filed a grievance seeking an upgrade for the Grievor. The Union claimed that since the arrival in the laboratory of the Tech III, who was reclassified from a Tech II position, the duties of the Grievor had changed significantly, and many of the duties and functions she performed were not reflected in the job description of a Tech I, but in higher classifications.

AWARD: The grievance was allowed. Evidence indicated that the work in the unit was shared between the Grievor and the Tech III as equals. This arrangement resulted from the increasing volume of work and the small size of the section. Thus, a hierarchical division of duties and responsibilities was not possible. The Arbitrator found that the Grievor was regularly performing work of greater responsibility than that of a Tech I, and ruled that she was entitled to be reclassified as a Tech II effective from the date on which the grievance was filed.

AUTHORITIES: None cited.

FILE NO. AA88-03-006

EMPLOYER: Rural Municipality of Argyle

UNION: International Union of Operating Engineers, Local 901

ARBITRATOR: A.R. McGregor, Q.C.

APPEARANCES: D. Newman, for the Employer
G. Mendelson, for the Union

ISSUES:
1. Seniority: Acquisition and Termination 6:1000
2. Organization and Direction of the Work Place: Defining the Bargaining Unit: Temporary, Casual, and Part-time Employees 5:1124
3. Foreman and Supervisors 5:1126
4. Managers 5:1127
5. Subsections 1(k), 2(2), 58(1), 75.1, 108(1), 109, and 121.2(5)(a) of The Labour Relations Act

DECISION RENDERED: March 22, 1988

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Union made an Application for Certification for a unit of employees which included the first two Grievors, who were seasonal employees, and the third Grievor, the Operator/Foreman, who was reclassified to Management/Foreman. When the Employer supplied the Union with a seniority list pursuant to the terms of the collective agreement, the Grievors were excluded from the list. The Union filed two grievances alleging that the Employer violated the collective agreement by excluding the Grievors from the seniority list. The Union argued that the reference to seasonal employees in the wage schedule contained in the agreement would ipso facto include the first two Grievors. It also was of the opinion that although the Grievors were laid off, they remained employees under the collective agreement. With respect to the third Grievor, the Union argued that although his title had changed from Operator/Foreman to Management/Foreman, he was not responsible for hiring or firing, nor did he discipline employees. Therefore, he should not be classified as management.

The Employer contended that the first two Grievors were not employees because their duties had been contracted out; thus, work was not available for them. The Management/Foreman was excluded from the seniority list because the Employer did not believe that including him in the bargaining unit was fair to the other members. In addition, it argued that the position should be excluded because it was evolving to include more managerial responsibility.

AWARD: The first grievance was denied. The Arbitrator found that the first two Grievors were not employees at the time the collective agreement was imposed, because their job functions no longer existed. As a result, their lay-offs became terminations. Therefore, the Arbitrator ruled that they had no seniority rights.

The second grievance was allowed. The Arbitrator found that although the duties of the third Grievor had changed, he did not perform managerial duties. His duties were clearly of a supervisory nature, and, as per subsection 2(1) of The Labour Relations Act, he should not be considered a manager. As well, the Arbitrator did not find that the inclusion of the Grievor in the bargaining unit would be unfair to the other members. Therefore, he should have been included on the seniority list.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-03-007

EMPLOYER:	Flin Flon General Hospital
UNION:	Manitoba Food & Commercial Workers, Local 832
ARBITRATOR:	Dr. P. Phillips
APPEARANCES:	R. Black, for the Employer D. Primeau, for the Union
ISSUES:	1. Seniority: Senior Employee with the Required Ability 6:3210 2. Trial, Training, and Familiarization Periods 6:3230 3. Ability and Qualifications Criteria 6:3300 4. Remedial Authority of the Arbitrator: Promotions 6:4100
DECISION RENDERED:	March 28, 1988
EXPEDITED ARBITRATION:	Yes

CIRCUMSTANCES: The Grievor, who had seven years seniority in the position of Admitting Clerk, applied unsuccessfully for the position of Storeroom Clerk. The position was awarded to a relatively new employee. The Union filed a grievance alleging that the Employer had violated articles 9 and 11 of the collective agreement, which stated that a position was to be awarded to the senior member of the bargaining unit providing that that employee possessed the required qualifications. The Union accused the Employer of manipulating the posted qualifications for the position to ensure the hiring of a preselected candidate. In addition, the Union contended that the revised qualifications were unreasonable, given the nature of the job.

The Employer argued that the qualifications were revised in anticipation of the computerization of the operations. In the Employer's opinion, although the Grievor was the senior applicant, she did not possess the qualifications specified in the job description, while the successful applicant did.

AWARD: The grievance was allowed. The Arbitrator found that the coincidence of the sequence of events leading up to the hiring of the successful candidate created a prima facie case of manipulation by the Employer. The Arbitrator also found that the degree of difficulty for the job was exaggerated, because reorganization of the store room and computerization would simplify the job, rather than make it more complex. Therefore, the Arbitrator ruled that the required qualifications were not reasonable, and that the Grievor was not given a reasonable chance to demonstrate her ability to fulfill the job requirements. As a result, the Arbitrator ordered that the Grievor should be offered the position of Storeroom Clerk.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-03-008

EMPLOYER: Felec Services Inc.

UNION: International Association of Machinists and Aerospace Workers

BOARD: D.E. Bowman, Q.C., Chairperson
R. Whiteway, Nominee for the Employer
L. Charbonneau, Nominee for the Union

APPEARANCES: G.D. Parkinson, for the Employer
L. Paulson, for the Union

ISSUES: 1. Interest Arbitration 1:0000
2. Jurisdiction of the Arbitrator: The Collective Agreement 2:1200

DECISION RENDERED: March 28, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Union represented the employees providing warehouse, clerical and technical support services at the Employer's Winnipeg warehouse. The parties were negotiating a new collective agreement. After the Union members rejected the proposed agreement, the Union sought the Board's ruling on a number of issues. The Employer argued that it should not be confronted with further changes, because it was led to believe the Union had accepted the agreement.

The Union requested a general wage increase of seven percent with a further five percent increase the following year. It also sought a wage adjustment for Buyers, Electronic Specialists and Clerks of $1.00 per hour to be applied before the first general wage increase. The Employer stood firm on the contents of the proposed collective agreement for a three percent general increase, an increase in severance pay and an in-the-night differential for the first year, followed by a three percent increase in the second year together with a vacation pay increase of one percent.

The Union wanted the two Buyers reclassified to the classification of Transport Specialist, which would involve a sixty cent per hour increase. The Employer agreed to this, as long as the Buyers would be available to perform the duties of the Transport Specialist, and the reverse. The Union objected because the Buyers, both women, should not be expected to perform some of the heavier duties of the other position.

The Union requested parity in vacation pay benefits between the Employers northern and Winnipeg employees, which would result in an increase for the Winnipeg workers. The Employer stood firm to the offered one percent increase for all employees with more than two years of service.

The Union sought a sick leave clause that would allow an employee to accumulate one day of sick leave for each month of service to the maximum number of months involved in the collective agreement, in addition to the existing ten-day limit. The Employer offered to increase the "cap" to a twenty-day maximum.

The Union proposed the inclusion of a dental plan similar to that offered to the northern employees. As well, the Union proposed a clause to create a wage loss insurance plan equivalent to the Workers' Compensation Plan of the Northwest Territories. The Employer argued that it was not prepared to discuss this point, as the proposal had been withdrawn from negotiations when it assured the Union that coverage equivalent to Workers' Compensation existed.

AWARD: The Board ordered a three percent increase for each year, because this was consistent with other settlements in Winnipeg and the environs. It could not find any significant justification for any special treatment of the Buyers, Electronic Specialists and Clerks.

The Board concluded that the Buyer classification should be changed, but with the condition that those who currently held the position would be protected from extra duties, but any new employees would be expected to carry out both functions.

The Board awarded the one percent vacation pay increase initially offered by the Employer. It saw no reason to impose parity between the northern and Winnipeg employees. As well, the Board found that the vacation pay benefits of the Winnipeg workers were not deficient when compared to the benefits negotiated in other agreements in the environs.

The Board awarded one day sick leave for each month of service up to a maximum accumulation of twenty-four days. As well, a minimum five day allotment already available for the first year of employment should remain.

The Board stated that it did not have the information necessary to allow for the appraisal of costs and benefits of a dental plan. It ruled that this benefit should be achieved through negotiations. Thus, it denied the Union's request. As well, the Board did not believe it had sufficient material before it to make a decision on the issue of wage loss insurance. However, it reserved the jurisdiction to hear the matter, if the Employer could not prove that coverage existed.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-03-009

EMPLOYER: The University of Manitoba

UNION: Canadian Association of Industrial, Mechanical and Allied Workers, Local 9

ARBITRATOR: D.E. Bowman, Q.C.

APPEARANCES: W.D. Hamilton, for the Employer
S.G. Soronow, for the Union

ISSUES:
1. The Arbitration Process: Preliminary Objections 3:2100
2. Jurisdiction of the Arbitrator: Arbitrability: Parties 2:3110
3. Organization and Direction of the Work Place: Unit Definition in Terms of Employees 5:1120
4. Temporary, Casual, and Part-time Employees 5:1124

DECISION RENDERED: March 28, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor was hired in April 1986, as a casual staff member and was laid off in August 1986. During that period, he was treated as a member of the bargaining unit, and union dues were deducted from his wage. He applied for re-employment in May or June 1987, at which time he was advised that there was no available employment, while members with less seniority than the Grievor were employed. Therefore, the Union filed a grievance alleging that the Grievor was being excluded from seniority for casual re-employment purposes.

The Employer raised a preliminary objection to the arbitrability of the grievance, because the Grievor was a student. Under the Manitoba Labour Board certificate, and under article 2.5 of the collective agreement, "students" were excluded from the bargaining unit. Thus, the Grievor was not eligible to file a grievance. Although the Grievor was initially hired as a non-student, the Employer claimed his student status was not known to it.

The Union denied that the Grievor was a student at any of the relevant times, as he was not registered in any courses. The Union disagreed with the Employer's definition of an academic year, September 1st to August 31st of any given year. It explained that when the Grievor applied for employment, he was unsure if he would return to school in the fall of 1986. When he was advised in the summer that there was no employment available, he registered for some university courses. When the Employer learned that the Grievor had enrolled in courses, it unilaterally altered the Grievor's status from "non-student" to "student."

AWARD: The grievance was denied. The collective agreement did not clearly establish the period of an academic year. The Arbitrator could not find any authority or consistency of practice that would define an academic year or when a student loses that status. Because the Grievor was enrolled in courses during the spring of 1986, he was a student under the Employer's definition. As well, the Arbitrator viewed the Grievor as a student who, although uncertain if he would register for further courses in September, was seeking the type of employment which would allow him to keep that option open. The Arbitrator ruled that, because the Grievor was a student, he was not covered under the terms of the collective agreement, and therefore the grievance was not arbitrable.

AUTHORITIES: Re United Steel Workers of America and Westeel Rosco Ltd., 1969, 20 L.A.C. 202; and Brown & Beatty, Canadian Labour Arbitration (2nd ed.) pp. 56-57.

FILE NO. AA88-03-010

EMPLOYER:	The Province of Manitoba
UNION:	The Manitoba Government Employees' Association
ARBITRATOR:	P.S. Teskey
APPEARANCES:	O. Zabloski/L. Ralph, for the Employer G. Rodgers, for the Union
ISSUES:	1. Compensation: Entitlement to Wages: Overpayment 8:1410 2. Withholding Wages 8:1420 3. Section 77 of The Financial Administration Act
DECISION RENDERED:	March 30, 1988
EXPEDITED ARBITRATION:	No

CIRCUMSTANCES: The Grievor, who was employed as a Storekeeper I, was paid on the basis of an eighty-hour work period. Subsequent to the effective date of the new collective agreement, the employees in the stores area were compensated for a 72.5-hour bi-weekly pay period, but received an hourly rate increase so they would not suffer a decrease in pay. The Grievor's personnel record was not updated properly, as he was still noted as working eighty hours bi-weekly. Due to the clerical error, the negotiated salary increase, and his annual salary increment, the Grievor received a substantial pay increase. Although the Grievor had pointed out the error, the Employer did not detect it until two years later. The Employer indicated that repayment of the wages would have to be made. After four months of unsuccessfully attempting to negotiate a repayment agreement, the Employer began recovering the overpayment from the Grievor's pay cheques without his consent. The Union filed a grievance claiming that the overpayment was not recoverable and that the Employer had no right to unilaterally begin the deductions.

The Employer argued that the Grievor was being paid for time he did not work. Under section 77 of The Financial Administration Act, the Grievor was obliged to repay the overpayment, which had resulted from a mistake of fact, not a mistake of law. Therefore, the monies could be collected and would be over a twenty-four-month period, as was government policy in an overpayment case.

The Union did not dispute the Employer's right to adjust the wage rate to the proper level. However, it argued that the Employer had no right under the collective agreement to unilaterally make deductions from the payroll. As well, it disagreed with the retroactive recovery, and that the Employer did not await the outcome of the arbitration hearing before beginning recovery. The Union further argued that the Employer was estopped from its actions, because of its negligence. It was also estopped because the error was not detected through an audit, and because the Grievor was reliant upon his level of income. The Grievor had no reason to believe a mistake was made, because he received an increment and general salary increase. As well, he had made no attempt to hide his earnings from the Employer.

AWARD: The grievance was allowed in part. From the evidence, the Arbitrator found that the overpayment was due to an innocent clerical error. He could not find that the Employer was negligent to an extent to bar recovery. As well, he could not find sufficient evidence to support an absolute defense of estoppel or detrimental reliance. Therefore, he ruled that the Employer had the right to recover the overpayment, but he ruled that the twenty-four-month policy was unfair, unreasonable, and was a breach of the collective agreement. Although the Arbitrator had no jurisdiction to order a method of repayment, he directed that deductions cease until the parties could negotiate an appropriate method of repayment.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-04-001

EMPLOYER: Villacentres Management (1984) Limited

UNION: Oakview Tuxedo Nurses MONA, Local 8

ARBITRATOR: A.R. McGregor, Q.C.

APPEARANCES: D. Proctor, for the Employer
R. Deeley/G. Smorang, for the Union

ISSUES:
1. Discipline: Discharge 7:3542
2. Fighting, Assault 7:3430
3. Rehabilitative Potential 7:4422
4. Economic Hardship 7:4426
5. Jurisdiction of the Arbitrator: Reinstatement and Substitution of Penalty 2:1470
6. Subsection 69.2(2) (amended s. 80(2)) of The Labour Relations Act

DECISION RENDERED: April 7, 1988

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Grievor, a Licenced Practical Nurse, was employed to care for residents requiring a high level of care. On the day in question, the Grievor was making her rounds and discovered one of the residents, who was undressed, getting into the empty bed of another resident. When the Grievor was unsuccessful in attempting to verbally convince the resident to dress and to return to her room, she requested the assistance of a Nurse's Aide. The Grievor and the Aide partially dressed the resident, leaving the buttons on her dress undone from her neck to her waist, exposing her undergarments. They then proceeded to guide the resident too briskly back to her room. At that moment, the resident's granddaughter saw the trio, was disturbed by what she saw, and made a complaint to the Employer. As a result of its investigation, the Employer discharged the Grievor for alleged abuse to the resident. The Union denied that the patient was abused, and filed a grievance alleging that the Grievor was unjustly discharged. The Union accused the Employer of not following the concept of progressive discipline and of discriminating against the Grievor, because the Aide who assisted her was not disciplined.

The Employer contended that the resident was mistreated and the Grievor handled her in a rough fashion. It was of the opinion that the Grievor was unable to handle the stresses of geriatric nursing. As well, the Employer stated that progressive discipline did not apply in a health care facility.

AWARD: The grievance was allowed. The Arbitrator could not find that the Employer discriminated against the Grievor, because she had a greater degree of responsibility than the Aide and was subject to greater discipline. However, the Arbitrator found that the actions of the Grievor did not amount to patient abuse, but rather improper treatment, and did not warrant dismissal, especially upon consideration of her past experience, her satisfactory employment record, and the expectation that the incident would not recur. As well, dismissal would inflict extreme economic hardship upon the Grievor, as her career in nursing would be ruined. Therefore, the Arbitrator ordered the dismissal to be set aside and that the Grievor be reinstated after a one-month suspension without pay.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-04-002

EMPLOYER: Rural Municipality of Dauphin

UNION: International Union of Operating Engineers, Local 901

ARBITRATOR: J. Atwell

APPEARANCES: D. Newman, for the Employer
D. Macri, for the Union

ISSUES:
1. Seniority: Recall of Persons on Lay-off 6:2350
2. Compensation: Fringe Benefits: Scheduling Vacations 8:3240
3. The Collective Agreement: Intention of the Parties 4:2100
4. Management's Duty to Act Fairly 4:2320
5. Subsection 69.2(2) (amended s. 80(2)) of The Labour Relations Act

DECISION RENDERED: April 12, 1988

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: This award dealt with two grievances:

Grievance No. 1: The Union alleged that the Employer had violated article 6:02 of the collective agreement, because it did not grant three days' leave between Christmas and New Year's Day. The Union argued that, in the past, three days' holiday had been granted, with the exception of one year when there was a snow storm. The Union was of the opinion that the phrase in article 6:02, "at the discretion of the Municipality", was confined to periods of heavy snowfall. If the Employer was to have complete discretion, then article 6:02 would not have been included in the collective agreement. The Employer contended that article 6:02 should be given its plain meaning, that is, the past practice of granting an unspecified period of time off, not three days off.

Grievance No. 2: The Union alleged that the Employer, as set down in article 19:10 of the collective agreement, did not make "every effort" to provide employment for the Grievors, two Equipment Operators it had laid off for approximately one and one-half months. The Union argued that the Employer was mistaken in assuming that because there was little snowfall that there was no work available for the Grievors, as they normally performed maintenance on equipment. The Union argued that work was available because: (a) a mechanic was brought in to assist with work normally performed by the Grievors; (b) one operator worked two hours of overtime; (c) and a number of maintenance activities normally carried out in the winter had not been undertaken which resulted in operations falling behind schedule. The Employer argued that, after considering the weather forecast, the jobs cited by the Union could be completed in a certain time span. It also argued that past practice was not always reasonable for the present. Therefore, it disagreed with the Union's claim that the lay-offs were wrong because this procedure was contrary to past practices. As well, the collective agreement did not mention "past practice" as a criteria for scheduling work. The Employer felt it had made a reasonable effort to find employment, not only because it had delayed the lay-offs for a month, but because it considered evidence presented to it by the Union before finalizing its decision. Finally, the Employer defended its actions of bringing in a mechanic and scheduling overtime, because recalling employees on lay-off for a few hours of work would not be practical.

AWARD: The first grievance was denied. The Arbitrator found that, if the Employer was bound by past practice, the phrase, "at the discretion of the Municipality", would have been omitted. Exercising its discretion did not confine the Employer to circumstances for which vacation was denied in the past. In addition, the Arbitrator found that the Employer had exercised its discretion properly, because at the time only one operator was employed and part-time help was hired due to a heavy work load in the office.

The second grievance was allowed in part. The Arbitrator ruled that, although article 19:10 should not be interpreted as a work guarantee, the Employer had violated the collective agreement, because it did not "make every effort" to prevent the lay-offs because it had failed to provide a full and complete hearing of the Union's proposal of possible alternatives to the lay-offs. As well, "every effort" implied that when work became available, the laid off employees should have been given an opportunity to perform the work. The Arbitrator did not award compensatory damages, because the amount levied would be based on speculation.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-04-003

EMPLOYER: Motor Coach Industries Limited

UNION: International Association of Machinists and Aerospace Workers, Lodge 1953

BOARD: M.H. Freedman, Q.C., Chairperson
H. Matthews, Nominee for the Employer
S. Green, Q.C., Nominee for the Union

APPEARANCES: K.G. Houston, Q.C., for the Employer
L. Paulson, for the Union

ISSUES:
1. Jurisdiction of the Arbitrator: Limits to the Arbitration of Grievances: Arbitrability: Time Limits 2:3128
2. Limitations Apart from the Collective Agreement: Delay 2:3210

DECISION RENDERED: April 15, 1988
(Previous Award - October 16, 1984)

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Board had issued a previous award on October 16, 1984, which the Employer sought to have quashed. On January 16, 1985, the Court of Queen's Bench declined to do so. Three and one-half years later the Union requested that the Board reconvene to rule on "outstanding issues" regarding the claims of the Grievors.

The Employer objected to any proceedings being conducted, because three of the Grievors could not be located. The Employer argued that, because of the lengthy time delay, the rights of the five individuals had lapsed, and the doctrine of laches applied. In addition, it contended that the Union and the Grievors were responsible for the unreasonable delay, and there was no evidence that the Employer encouraged a delay, especially as the Union had received a clear and explicit answer in November 1985.

The Union stated that it continued to negotiate with the Employer regardless of its stated position, because in its experience it felt the Employer might alter its position. As well, the Union argued that because its claim was in "1983 dollars" the Employer would suffer no prejudice if the matters proceeded.

AWARD: The grievance was found to be arbitrable. The Board found that the delay was attributable to the Union, as it took an inordinate length of time in bringing the Grievors' claims to arbitration. However, the Board could not conclude that the long delay prejudiced the Employer. Therefore, the Employer could not succeed on the issue of laches, because it could not establish some form of prejudice as a consequence of the delay. The Board ruled that the Union may present its evidence and arguments on the merits of its claim.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-04-004

EMPLOYER: The City of Winnipeg

UNION: Canadian Union of Public Employees, Local 500

ARBITRATOR: M.H. Freedman, Q.C.

APPEARANCES: M. Samphir/M.E. Cavett, for the Employer
R. Tonn, for the Union

ISSUES:
1. Seniority: The Skill and Ability Requirement:Examinations and Tests 6:3340
2. Remedial Authority of the Arbitrator: Promotions 6:4100

DECISION RENDERED: April 19, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievors, two Assessors III employed in the Assessment Department, unsuccessfully applied for the position of Assessor IV Specialist in the Systems and Standards Branch. The position was awarded to an Assessor II who already was employed in the Systems and Standards Branch and who was junior to both the Grievors. Grievances were filed, and at step 3 of the grievance process, the Employer decided to rebulletin the position and to develop "a suitable test" to evaluate the applicants. The Grievors, the incumbent and one other person applied, and the incumbent was once again appointed. Grievances were again filed alleging that the test gave an unfair advantage to the incumbent, because he was occupying the bulletined position. In addition, the Union argued that the questions were fairly specific to the incumbent, because they related to work he was performing at the time. As there was little interchange between branches, others in the Assessment Department had limited contact with the Systems and Standards Branch. The Union also complained that the process was biased, because of remarks made by a manager to one of the Grievors, and because the incumbent conducted the "walk through" to familiarize the applicants with the branch. Finally, the Union grieved that the method utilized for marking the tests was unfair.

The Employer stated that interviews were given to remedy any oversights made during the testing phase. It also argued that even if errors were found with the testing process that was not the same as establishing that either one of the Grievors was qualified, whom in its opinion were not.

AWARD: The grievances were allowed. The Arbitrator ruled that the administration of the test was flawed, because the marking key was not always adhered to and was not completely reliable; some questions were unclear; biased comments were made to one of the Grievors; and the "walk through" was conducted by the incumbent. However, due to a lack of evidence, the Arbitrator was not prepared to find that either Grievor was qualified, nor that the test was skewed in favour of the incumbent. Therefore, the matter was remitted to the Employer for a fresh determination.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-04-005

EMPLOYER: Winnipeg Receiving Resources Inc.

UNION: Canadian Union of Public Employees, Local 2153

ARBITRATOR: Dr. P. Phillips

APPEARANCES: R. Cann/H. Quinn, for the Employer
S. Oakley, for the Union

ISSUES:
1. The Collective Agreement: Management Rights 4:2310
2. Organization and Direction of the Work Place: The Requirement of Bona Fides 5:2300
3. Seniority: The Skill and Ability Requirement: Physical Qualifications 6:3360
4. Promotion, Demotion and Transfer 6:2100

DECISION RENDERED: April 21, 1988

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Grievor was transferred for non-disciplinary reasons, against her wishes, from the Employer's facility for boys to its facility for girls. The Union filed a grievance alleging that the transfer was discriminatory and unjust. The Grievor testified that she was transferred, because the Employer wanted an additional male staff member at the boys' facility, and because it wanted an additional experienced person at the girls' facility.

The Employer's position was that the right of transfer was an unfettered management right, and in this instance, its actions were neither discriminatory, arbitrary, nor in bad faith. It expanded on the Grievor's explanation for the transfer. The male presence in the boys' facility needed to be strengthened due to a high incidence of crises, and the number of experienced staff at the girls' facility needed strengthening due to staff turnover.

AWARD: The grievance was denied. The Arbitrator found that sex discrimination played a role in the decision to transfer the Grievor. However, evidence supported the view that the Employer's actions were reasonable, because the Grievor's experience was needed to strengthen the team at the girls' home. Thus, while the discriminatory reason for the transfer diminished its purpose, the legitimate reason increased it.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-04-006

EMPLOYER: Hudson's Bay Company, Retail Store

UNION: Retail, Wholesale and Department Store Union of America, Local 468

ARBITRATOR: P.S. Teskey

APPEARANCES: D. Newman, for the Employer
R. Tonn, for the Union

ISSUES: 1. Seniority: Lay-off 6:2200
2. Reduction of Hours 6:2210
3. Jurisdiction of the Arbitrator: Estoppel 2:2200

DECISION RENDERED: April 21, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: Two full-time employees, a cashier and a floorperson, were informed that their full-time status could not be maintained. They were given the option of accepting regular part-time positions, or of resigning and receiving severance pay. Each was given a day to make up her mind. Neither felt that she could survive economically on the salary earned through the regular part-time position, and resigned. Subsequently, the Union filed grievances on behalf of the individuals, apparently without their specific knowledge, that alleged that the Grievors were improperly laid off by the Employer, because the hours of full-time employees were reduced, rather than reducing the hours of more junior part-time employees. The Union noted that, although the actions of the Employer were based upon economics rather than bad faith, the savings contemplated were not large. The work schedules illustrated that there was a full-time position available on the floor and on cash.

The Employer had maintained that, due to decreasing revenues and the need to provide an adequate level of service, the two full-time positions were eliminated to achieve a cost savings and to better schedule staff when the need for service was greatest. The Employer was of the opinion that it had adhered to the principle of seniority, because the junior of the two full-time cashier positions was affected. The other Grievor was the only full-time floorperson. It also agreed that the Grievors were estopped from relief, because not only did they sign a release, but they also received monies. The Union countered that the Grievors were not estopped, because the Union was not aware that they had signed releases, and had not been involved in previous discussions between the Employer and the Grievors.

AWARD: The grievance for the floorperson was denied, while the grievance concerning the cashier was allowed; but, the Arbitrator concluded that both Grievors were precluded from specific relief, because of the releases they had signed, and that they knew the meaning of the releases. However, the Arbitrator ruled that the Union was not estopped from declaratory relief, because most of what took place did so without the knowledge or advisement of the Union.

The Arbitrator found that the Employer had violated the collective agreement particularly with respect to the full-time cash position. The net effect of eliminating the full-time cash position was almost negligible in terms of hours saved or changes in shift patterns to meet customer demand. The Arbitrator cautioned the Employer that some protection and consideration was to be given to the maintenance of full-time positions, and that it must reasonably exercise discretion in terms of reorganization. However, he could not accede to the Union's request to order the cashier position to be posted, because he could not speculate how a second full-time position would fit into the altered store hours.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-04-007

EMPLOYER: Canada Safeway Ltd.

UNION: Manitoba Food and Commercial Workers, Local 832

ARBITRATOR: P.S. Teskey

APPEARANCES: M. Christiansen, for the Employer
D. Primeau, for the Union

ISSUES:
1. Organization and Direction of the Work Place: Work Hours and Shifts 5:3100
2. Voluntary or Compulsory 5:3210
3. Compensation: Wage Guarantees 8:1200
4. The Collective Agreement: Intention of the Parties 4:2100
5. Management Rights 4:2310

DECISION RENDERED: April 28, 1988

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Grievor was scheduled to work a Sunday shift, but refused because she had worked the previous six days. She alleged that, as a consequence of her refusal, she was not given her assured hours of work for the following week. The Union filed a grievance on behalf of the Grievor, and a policy grievance alleging that the Employer had violated article 6.07 of the collective agreement and the Letter of Understanding 10 ("L.O.U. 10"), because it unilaterally introduced the assigned rotation of Sunday hours which were to be assigned on a voluntary basis. L.O.U. 10 stated that Sunday work and the scheduling of employees would continue as in the past. The Union thought that the past practice was the scheduling of junior staff only when sufficient volunteers were not available. Further, it interpreted that the past practice was not to include the necessity to work on Sundays to obtain the guaranteed work hours. However, it contended that a pattern was apparent that employees who could or would not work on a Sunday were not given the opportunity to make up the hours to meet the guarantee. It argued that the imposition of a penalty on a person who refused to work volunteer hours was inconsistent and unfair.

The Employer had taken the position that Sunday hours would be included in the guaranteed hours. It interpreted L.O.U. 10 would allow the individual stores to continue with their own procedure for scheduling Sunday hours that they had employed prior to the existence of the current collective agreement.

AWARD: The individual grievance was allowed. The Arbitrator found that scheduling the Grievor to work seven days in a row was neither fair nor reasonable. He also found that the Employer had not made any efforts to accommodate the Grievor's particular situation. Therefore, the Arbitrator ordered that the Grievor should be compensated for the difference between the hours scheduled and her assured hours.

The policy grievance was allowed in part. The Arbitrator found that both the Union and the Employer had breached the collective agreement and L.O.U. 10. The Arbitrator ruled that L.O.U. 10, although the wording was vague, recognized that the scheduling procedures set down in article 6.07 were worthy of attempting to achieve, but it also allowed for possible variation after consultation with the affected employees. The Union had not fulfilled its obligation, because it had failed to assist in producing sufficient volunteers or to allow for alternative arrangements satisfactory to all. The Employer had violated the terms of the agreement, because it unilaterally imposed the rotation system, and had not discussed it in any organized way with the employees or the Union.

AUTHORITIES: Brown & Beatty, Canadian Labour Arbitration, (2nd ed.) pp. 158-159; and KVP Co. Ltd. (1965), 16 L.A.C. 73 (Robinson).

FILE NO. AA88-05-001

EMPLOYER:	Thompson General Hospital
UNION:	Manitoba Food and Commercial Workers, Local 832
ARBITRATOR:	J.M. Cooper
APPEARANCES:	V. Rachlis, for the Employer D. Primeau, for the Union
ISSUES:	1. Organization and Direction of the Work Place: Assignment of Bargaining Unit Work to Non-unit Employees 5:1400 2. Scheduling Work: Persons Normally Performing the Work 5:3222 3. Allocation of Overtime Within the Group 5:3224 4. Jurisdiction of the Arbitrator: Missed Overtime Opportunities 2:1423
DECISION RENDERED:	May 6, 1988
EXPEDITED ARBITRATION:	Yes

CIRCUMSTANCES: The Union filed three grievances on behalf of individuals and three policy grievances. All six related to the position of nurses aides. In the first two grievances, the Union alleged that, when the scheduled nurses aide was unable to work, a graduate nurse was called in, rather than the most senior full-time aide. The Union alleged that the nurse performed the duties of an aide on those shifts, and was called in because her pay was less than the Grievors' overtime rate of pay. The third grievance arose because the Employer did not call in the Grievor who was the most senior full-time aide available to replace a temporarily absent aide. In the policy grievances, the Union alleged that the Employer did not post the position of nurses aide when a full-time aide resigned; did not call in a replacement when an aide was temporarily absent, and thus, work was performed by non-bargaining unit employees; and did not staff certain shifts with nurses aides. The Union argued that, although nurses performed almost all the duties that aides did, the aides performed them most of the time.

With regard to the first two grievances, the Employer argued that the nurse was called because a professional, not an aide, was needed. Also, on those occasions, the nurse did not perform the duties of an aide. In the case of the third grievance, the Employer contended that an incorrect seniority list was used, and it should not be held accountable for an unintentional clerical error. In response to the policy grievances, the Employer responded that due to a lack of work and funding problems, it had decided to reduce the work force through attrition. A replacement was not called in, because the ward was adequately staffed, so the extra help of an aide was not needed. Its policy to not schedule an aide for all shifts was based on economic constraints. Lastly, it argued that all functions carried out by nurses aides were delegated nursing functions. Nurses had specialized duties that could not be performed by aides, while the reverse was not true.

AWARD: The three individual grievances were allowed. The Arbitrator ruled that the Employer had violated the collective agreement, because its decision to call in the nurse was based on economics, and that adequate work was available for an aide to perform. For the third grievance, the Arbitrator ruled that the Employer was responsible for the error, even if it was unintentional. She ordered that the Grievors were to be compensated for the lost shifts.

The policy grievances were denied. The Arbitrator was not satisfied that the Union demonstrated that the absence of aides resulted in nurses performing bargaining unit work to a significant degree that it altered the content of their work. Also, the Arbitrator could not find evidence of bad faith on the part of the Employer, but simply an insufficient amount of work that could not warrant the posting of vacancies or the staffing of nurses aides on certain shifts.

AUTHORITIES: Re Beacon Hill Lodges of Canada Ltd. and Service Employees Union, Local 210, (1985) 20 L.A.C. (3d) 316; and others.

FILE NO. AA88-05-002

EMPLOYER:	The Province of Manitoba
UNION:	The Manitoba Government Employees' Association
ARBITRATOR:	P.S. Teskey
APPEARANCES:	O. Zabloski, for the Employer B. Havelock, for the Union
ISSUES:	1. Organization and Direction of the Work Place: Temporary, Casual, and Part-time Employees 5:1124 2. The Collective Agreement: Intention of the Parties 4:2100 3. The Arbitration Process: Onus or Burden of Proof 3:2400
DECISION RENDERED:	May 12, 1988
EXPEDITED ARBITRATION:	No

CIRCUMSTANCES: The Grievor was employed as a Training Analyst. The term of the position was initially for five months, but had been extended a number of times. The Union filed a grievance alleging that the Employer was to convert the position to Civil Service status, as the conditions cited in article 5:04 of the collective agreement had been met. The article stipulated that a position was to be converted to regular status if the employee was employed in the same position and performed the same function for a period of more than twenty-four continuous months, and where the need for the function was expected to continue.

The Employer conceded that the Grievor had been employed in the same position, performing the same function for more than twenty-four continuous months. However, it argued that the function was not expected to continue, as the probability of future funding for the program was unknown. As well, its emphasis might have been shifting away from training. The program was not intended to be permanent, otherwise, it would have been included under the regular departmental budget.

AWARD: The grievance was denied. The Arbitrator found that the term of the program was intended to be finite, because the program was designed for a maximum of three cycles. Therefore, the Arbitrator ruled that the Union had not met the onus of establishing that the Grievor's function was expected to continue.

AUTHORITIES: The Province of Manitoba and The Manitoba Government Employees' Association, unreported, Manitoba, May 11, 1987.

FILE NO. AA88-05-003

EMPLOYER: Hudson Bay Mining and Smelting Co. Ltd.

UNION: United Steelworkers of America, Local 8144

ARBITRATOR: J. Atwell

APPEARANCES: Not Stated

ISSUES:
1. Compensation: Call-in Pay 8:3400
2. Exception: Beyond the Employer's Control 8:3420
3. The Collective Agreement: Intention of the Parties 4:2100

DECISION RENDERED: May 13, 1988

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Grievors, twenty-nine underground workers, reported for the night shift. However, due to the presence of noxious gases, all but one of the Grievors were unable to perform any work. After two hours, the Employer sent all twenty-nine home, and paid them a four-hour reporting allowance. The Union filed a grievance alleging that the Employer's decision was unfair and unreasonable. It requested that the Grievors receive payment for the remainder of the shift. In addition, it requested that the Grievor who had worked during the two hours was entitled to the call-in pay, plus pay for the two hours worked. The Union argued that past practice, under similar circumstances, was for the Grievors to wait six hours for the gases to clear. They never were sent home before. As well, the four underground mechanics could have performed alternative surface work.

The Employer contended that because the Grievors received their call-in pay, it had met its obligations under article 16.01 of the collective agreement. It pointed out that the article dealt with situations where an employee was offered work in his own department. The Employer was not compelled to temporarily assign the underground mechanics to the surface shop, as that was not their department.

AWARD: The grievance was denied. The Arbitrator could not find any provisions in article 16.01 to support the Union's claims. In fact, he agreed with the Employer. With regards to the Grievor who performed some work, the Arbitrator ruled that simply because an employee was called upon to perform some duties, he was not entitled to additional remuneration when the amount of time worked was less than or equal to the number of hours covered by the reporting allowance.

AUTHORITIES: None cited.

FILE NO. AA88-05-004

EMPLOYER: Thompson General Hospital

UNION: Manitoba Food & Commercial Workers, Local 832

ARBITRATOR: S.G. Sigurdson, Q.C.

APPEARANCES: R. Shaw, for the Employer
D. Primeau, for the Union

ISSUES:
1. Organization and Direction of the Work Place: Distribution of Work Within the Bargaining Unit 5:2000
2. Vacancies 5:2510
3. The Collective Agreement: Management Rights 4:2310

DECISION RENDERED: May 16, 1988

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: Until the fall of 1987, the Employer employed two full-time Medical Records Transcriptionists. After one of the Transcriptionists resigned, a position was posted for a Medical Transcriptionist on a part-time basis. The Union filed a policy grievance alleging that the Employer had violated the collective agreement, because it had improperly reduced a full-time position to part time, and had posted it as a part-time position vacancy. The Union argued that from the time the position was filled, the Transcriptionist had been working full time eighty percent of the time.

The Employer contended that statistics confirmed that the work-load was not sufficient to employ two full-time positions. It explained that the two employees who held the part-time position since it was posted had been working almost full time because of their inexperience on the job.

AWARD: The grievance was allowed. The collective agreement stated that, "whenever possible, part-time jobs shall not be created out of full-time jobs." The Arbitrator ruled that this limited the Employer's prerogative to alter the status of the positions. He found that the reliability of the statistics used by the Employer was questionable. As well, he found that the work-load, even following the orientation period, continued to be enough for a full-time position. Thus, the Arbitrator concluded that, although the Employer's actions were bona fide and in good faith, the decision was not based on a reasonable view of objective facts.

AUTHORITIES: Palmer, Collective Agreement Arbitration in Canada, (2nd ed.); Re Pilkington Brothers, 13 L.A.C. (2d) 287 (Burkett, 1976); and others.

FILE NO. AA88-05-005

EMPLOYER:	Motor Coach Industries Ltd.
UNION:	International Association of Machinists and Aerospace Workers, Lodge 1953
ARBITRATOR:	D.E. Bowman, Q.C.
APPEARANCES:	J.M. Scurfield, for the Employer L. Paulson, for the Union
ISSUES:	1. Discipline: Grounds for Discipline: Refusal to Follow Instructions 7:3610 2. Discrimination 7:4414 3. Warnings 7:3542 4. The Collective Agreement: Company Rules 4:1500
DECISION RENDERED:	May 17, 1988
EXPEDITED ARBITRATION:	No

CIRCUMSTANCES: The Employer instituted a policy whereby all employees were required to wear a photo identification badge. The Grievor, who worked in a small assemblies area, was approached by her foreman, who could not see her badge and who requested her to wear it so her photo could be readily seen. The Grievor refused to reverse the badge as requested, because she objected to others looking at her picture. She continued to refuse to comply with the order of the foreman, who made similar requests two more times during the day. Due to the Grievor's refusal, the foreman recorded the verbal warning on her record. As a result, the Union filed a grievance alleging unjustified discipline.

The Union argued that, because the policy was deferred in another of the Employer's plants, the enforcement of the policy against the Grievor constituted discrimination. The Union further argued that the Grievor did not understand that a warning could be issued, or that the foreman's repeated instructions amounted to an order. Finally, the Union argued that the order was foolish, as the Grievor was well known to her foreman and others in her area. She should only have to display her photo, if she was in an unfamiliar area of the plant. The Union stressed that the Grievor's objections were made on the grounds of safety. The Employer contended that the Grievor was given every opportunity to comply with the policy, and non-compliance with the Employer's instructions warranted discipline.

AWARD: The grievance was denied. The Arbitrator could not find that the Grievor was being discriminated against, because the other plant was a separate entity. The Arbitrator ruled that the Employer was justified for disciplining the Grievor for repeatedly refusing to comply with a lawful instruction. He stressed that she should have complied with the order and grieved later.

AUTHORITIES: Brown & Beatty, Canadian Labour Arbitration, (2nd ed.) pp. 378 & 434; Re Nova Scotia Textiles Ltd. and United Textile Workers, Local 159, 5 L.A.C. (3d) 97; and Re United Steelworkers and Lake Ontario Steel Co. Ltd., 19 L.A.C. 103.

FILE NO. AA88-05-006

EMPLOYER: Hudson Bay Mining & Smelting Co. Ltd.

UNION: United Steelworkers of America, Local 8144

ARBITRATOR: C.B. Cramer, Q.C.

APPEARANCES: R. Kersey, for the Employer
M. Lysohirka, for the Union

ISSUES:
1. Discipline: Refusal to Follow Instructions 7:3610
2. Warnings, Suspension 7:3542
3. Scope of Review 7:4100
4. The Reasonableness of the Penalty 7:4300
5. Jurisdiction of the Arbitrator: Reinstatement and Substitution of Penalty 2:1470

DECISION RENDERED: May 19, 1988

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The four Grievors worked as welders in the Employer's service shop, where they overhauled and repaired equipment. The supervisor approached the Grievors one at a time to paint an exhaust fan housing. Each welder refused to follow the supervisor's order, because painting was not in the job description. The supervisor advised each Grievor to paint the fan housing and to grieve later, or he would have to go home. All four declined, and left work early. The following day, the Grievors were given written notification that demerits had been recorded due to their insubordination. The Union filed a grievance alleging that the Grievors were unjustly suspended, and sought to have the demerits removed from their records.

The Employer argued that the Grievors' job descriptions contained a general statement which modified the specificity of the working procedures to allow for the assignment of other work.

AWARD: The grievance was allowed in part. The Arbitrator found that the Grievors had understood the order and had disobeyed. Because their refusal was not for health or safety reasons, they should have done the work and grieved it later. Therefore, the Employer was justified in disciplining them. However, the Arbitrator ruled that the seriousness of the misconduct did not warrant six demerits, because the Grievors were not insolent or belligerent, production was not affected, and the refusals did not endanger life or limb. Thus, the Arbitrator ordered the demerits reduced to three, because the Grievors had already suffered economic penalty for leaving work early.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-05-007

EMPLOYER: Westfair Foods Limited

UNION: Manitoba Food & Commercial Workers, Local 832

ARBITRATOR: Prof. F.M. Steel

APPEARANCES: R. Roy, for the Employer
J. Lederman, for the Union

ISSUES:
1. Discipline: Insufficient and/or Careless Work 7:3520
2. The Reasonableness of the Penalty 7:4300
3. Discrimination 7:4414
4. Reinstatement and Substitution of Penalty 2:1470

DECISION RENDERED: May 19, 1988

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Grievor was employed as a part-time cosmetics clerk. She received a written reprimand, because she had neglected to properly encode a Mastercard slip. The Union filed a grievance alleging that the penalty was unjust. The Union contended that the failure to imprint the credit card was an accident, and not culpable behaviour, and therefore was not subject to discipline. Alternatively, it argued that such incidents previously had not been subject to discipline, and therefore the Employer's actions were inconsistent and discriminatory.

The Employer argued that the proper handling of credit cards was an important part of its business given the inherent risk of monetary loss. Therefore, it disciplined employees when mistakes were made with credit card transactions. It presented evidence to corroborate its claim.

AWARD: The grievance was allowed in part. The Arbitrator ruled that the error had been caused due to the Grievor's carelessness. As well, based on evidence presented, the Arbitrator could not find that the Employer had discriminated against the Grievor, because it had disciplined other employees for credit card errors. Although the Arbitrator found just cause for discipline: because the incident was a single act of carelessness which occurred on a busy night; because the customer was contacted, and no money was lost; and because of the Grievor's exemplary record and letters of commendation in her file, the Arbitrator ruled that the appropriate sanction should have been a verbal reprimand appropriately documented and placed in her file.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-05-008

EMPLOYER: Canada Safeway Limited

UNION: Manitoba Food and Commercial Workers, Local 832

ARBITRATOR: S.G. Sigurdson, Q.C.

APPEARANCES: J.M. Christiansen, for the Employer
D. Primeau, for the Union

ISSUES:
1. Seniority: The Skill and Ability Requirement: The Scope of Arbitral Review 6:3100
2. Senior Employee with the Required Ability 6:3210
3. Trial, Training and Familiarization Periods 6:3230
4. Discipline: Incompetence 7:3510

DECISION RENDERED: May 19, 1988

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Grievor, who was employed as a Pharmacy Technician, had been on sick leave for six months. When she was ready to return to work, the Employer informed her that her full-time position was no longer available at the store she had worked in. Because the Grievor was slow and error prone, the Employer decided that she would be placed in another store for an orientation period followed by an evaluation of her work. If she performed satisfactorily, she would be placed on full-time. After a two-week period, her performance did not meet the Employer's requirements and her status was reduced from full to part-time with the intention to reinstate her to full-time status if she improved her speed and accuracy. The Union filed a grievance alleging that the Employer had violated the seniority clause of the collective agreement as two employees who were junior to the Grievor retained their full-time status. The Union argued that the Grievor was reduced to part-time because the Employer believed the junior employees could perform the Technician's duties better than the Grievor. As well, the Union questioned why the Grievor was not previously informed of the dissatisfaction with her performance. The Employer contended that the Grievor's status was changed because she did not exhibit the proper attitude, speed or accuracy required for the position.

AWARD: The grievance was denied. The Arbitrator found that the Grievor had difficulty functioning under pressure and displayed a disquieting tolerance for mistakes. Although she never received a formal reprimand, she was aware of the Employer's concerns. The Arbitrator was satisfied that the orientation and evaluation period were bona fide and that the Employer acted fairly and in good faith.

AUTHORITIES: Re City of Vancouver and Vancouver Municipal and Regional Employees' Union, 5 L.A.C. (3d) 375; and Re Steinberg Inc. and Commercial Workers Union, Local 586, 16 L.A.C. (3d) 171.

FILE NO. AA88-05-009

EMPLOYER:	Deer Lodge Centre
UNION:	Public Service Alliance of Canada
BOARD:	G.C. MacLean, Q.C., Chairperson D.E. Sutton, Nominee for the Employer J. McNevin, Nominee for the Employee
APPEARANCES:	G. Parkinson, for the Employer G. Maruca, for the Union
ISSUES:	1. Discipline: Fighting, Assault 7:3430 2. Suspension 7:3542 3. Discipline and Discharge Procedures: Burden of Proof 7:2300
DECISION RENDERED:	May 26, 1988
EXPEDITED ARBITRATION:	No

CIRCUMSTANCES: The Grievor had been employed as a Nurse's Aide for seven years. Another Aide who worked for the Employer in a relief capacity accused the Grievor of telling two elderly residents to "shut up" and of slapping two others on the hand. As a result of an investigation into the allegations, the Grievor was suspended without pay for four weeks. The Grievor denied the allegations and the Union filed a grievance alleging that the suspension was unfair and unwarranted, especially upon consideration of the Grievor's good employment record.

AWARD: The grievance was denied. The Board found that the allegations did have foundation, because the relief worker had no motive to fabricate the incidents. Therefore, the Board ruled that the Grievor exceeded the bounds of her authority and had mistreated the residents.

DISSENT: J. McNevin, Nominee for the Union. Reasons were not submitted.

AUTHORITIES: None cited.

FILE NO. AA88-05-010

EMPLOYER: The City of Winnipeg

UNION: Amalgamated Transit Union, Local 1505

BOARD: M.H. Freedman, Q.C., Chairperson
J.R. London Q.C., Nominee for the Employer
R.B. McNicol, Nominee for the Union

APPEARANCES: M. Samphir, for the Employer
M. Myers, Q.C., for the Union

ISSUES:
1. Compensation: Alteration of Wages 8:1400
2. Illness: Benefits and Other Rights 8:3300
3. Jurisdiction of the Arbitrator: Estoppel 2:2200

DECISION RENDERED: May 30, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: Since 1979, the Employer had a policy of topping up the pay of workers on Workers' Compensation, so that they received one hundred percent of their gross salary. When these employees received their 1986 T4 slips, the amounts shown for employment income before deductions and income tax deducted was less than the cumulative amounts shown on their 1986 paycheque stubs. As a result, a portion of the income tax deducted from the pay of the injured employees would be refunded directly to the Employer. The Union filed a grievance arguing that the Employer had unilaterally and arbitrarily altered the amounts shown on the T4 slips, and was estopped from its actions because of its past practice of topping up the pay regardless of the wording of the applicable collective agreement. The Union also argued that according to the Income Tax Act, amounts deducted or withheld would be deemed to have been received by the employees. The Employer was merely a tax collector and it had no right to the employees' money.

The Employer explained that, because the Workers' Compensation payment was exempt from tax, an injured worker's take home pay was up to thirty percent more than if he was working. Thus, the Employer took corrective action by altering the amounts shown on the T4 slips. It argued that the employees were benefitting from a windfall situation, and therefore were not entitled to the money.

AWARD: The grievance was allowed. The Board found that this was a clear case of estoppel, because the Employer had followed the top up policy for so many years regardless of the wording of the collective agreement. The Board also found that the Employer knew or should have known that the Workers' Compensation benefits were tax free, and therefore it had not made a mistake, but had knowingly, intentionally and deliberately made the overpayment to its employees. Therefore, the Board ruled that the Employer could not unilaterally alter the T4 slips.

AUTHORITIES: Re CN/CP Telecommunications and Canadian Telecommunications Union (1981) 4 L.A.C. (3rd) 205; Re Canadian National Railway Co., et al, and Beatty, et al, 128 D.L.R. (3rd) 236; and Re Board of School Trustees, School District No. 45 and West Vancouver Municipal Employees Association No. 395 (1983) 12 L.A.C. (3rd) 38.

FILE NO. AA88-05-011

EMPLOYER:	Westfair Grocers, a Division of Westfair Foods Limited
UNION:	Retail, Wholesale & Department Store Union, Local 469
ARBITRATOR:	G. Reid
APPEARANCES:	R. Roy, for the Employer R. Deeley, for the Union
ISSUES:	1. The Collective Agreement: Management Rights 4:2310 2. Organization and Direction of the Work Place: Scheduling Work: Work Hours and Shifts 5:3100 3. Proprietary Rights to Overtime Assignments 5:3220 4. Seniority: Promotion, Demotion and Transfer 6:2100
DECISION RENDERED:	May 30, 1988
EXPEDITED ARBITRATION:	Yes

CIRCUMSTANCES: The Grievors, who were employed as Power Stackers in the warehouse, were informed by letter that they were being transferred from the night shift to the afternoon shift. The Union filed a grievance claiming that the shift change was unjustified and that the Grievors' seniority rights had been violated. It argued that the Grievors possessed the right to work a particular shift. As well, it stated that jobs do not exist simply as jobs, but as jobs in a specific time frame. The Union argued that the Grievors should have been laid off and the jobs on the afternoon shift should have been posted. The Grievors could then have exercised their seniority rights and could have bumped the junior employees on the night shift.

The Employer viewed its actions simply as a transfer of jobs from one shift to another. It contended that it was exerting its management rights to administer the workforce. In this case, the transfers were necessary to improve the efficiency of operations. It also argued that it had given appropriate consideration to seniority, because the most junior Power Stackers on the night shift were transferred. The Union asserted that the Employer should have considered seniority in the bargaining unit as a whole and not within a particular classification.

AWARD: The grievance was denied. The Arbitrator found that the collective agreement specified that seniority must be considered when shift changes were enacted, but it did not specify whether the reference point was the unit as a whole or a particular job classification. As well, no reference to "ownership" of a shift could be found. Therefore, because the transfers were not discriminatory, were not disciplinary and were not contrary to past practice, the Arbitrator ruled that the Employer had the right to alter the shift of the Grievors.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-05-012

EMPLOYER: Hamiota District Health Care Centre

UNION: Canadian Union of Public Employees, Local 3038

BOARD: M.H. Freedman, Q.C., Chairperson
R. Whiteway, Nominee for Employer
J. Peterson, Nominee for Union

APPEARANCES: R. Poole, for the Employer
R. Tonn, for the Union

ISSUES:
1. Seniority: Application of Seniority: Promotion, Demotion and Transfer 6:2100
2. The Skill and Ability Requirement: Senior Employee With the Required Ability 6:3210
3. Aptitude 6:3330

DECISION RENDERED: May 31, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, a part-time Health Care Aide, applied for a full-time position. However, the position was awarded to an applicant who was junior to the Grievor. The Union filed a grievance alleging that the Employer had violated the collective agreement.

The Employer stated that, as per the seniority clause of the collective agreement, seniority would be the determining factor in matters of promotion if the employee, among other factors, had a good employment record. It argued that the Grievor's work habits deteriorated over time, she seemed uninterested in performing her job well, and she made no effort to improve her skills.

The Grievor testified that she reviewed her performance appraisals and asked for details and examples of the criticisms cited, but none were provided to her. As well, she disagreed with a number of comments made in her evaluation.

AWARD: The grievance was allowed. The Board found that there was insufficient substance to the complaints made against the Grievor to justify the conclusion that she did not have a "good employment record." The Board suspected that the Employer did not think the Grievor was an appropriate person for promotion and that she was not as interested as they thought she should be. However, the agreement did not permit the Employer the discretion to evaluate an employee by its subjective assessment of attitude or to select the "best" candidate. It must select the most senior candidate, provided she met the threshold requirements in the collective agreement. In the Board's view, the Grievor should have been awarded the position.

AUTHORITIES: Re United Automobile Workers, Local 35, and Canadian Filters Ltd. (1970) 21 L.A.C., 219.

FILE NO. AA88-06-001

EMPLOYER: Burns Foods Ltd.

UNION: United Food and Commercial Workers
International Union, Local 111

ARBITRATOR: F.M. Steel

APPEARANCES: K. Lercher, for the Employer
C. Trigwell, for the Union

ISSUES:
1. Discipline: Grounds for Discipline: Innocent Absenteeism 7:3210
2. Non-disciplinary Demotion 7:3546
3. Employee Disability 7:3200
4. Onus 7:3250
5. Jurisdiction of the Arbitrator: Reinstatement and Substitution of Penalty 2:1470

DECISION RENDERED: June 3, 1988

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Grievor, an Improver in the maintenance department, was permanently demoted due to excessive absences caused by shoulder and knee problems. The Union filed a grievance alleging that the Employer violated article 10(3) of the collective agreement which provided that an employee recovering from an illness was to be returned to the same position providing he was able to perform the work satisfactorily. The Union argued that both problems had been corrected by surgery and the Grievor's prospects for future attendance were excellent.

The Employer contended that the demotion was non-disciplinary and was necessitated by the Grievor's excessive past absenteeism record, which inferred an inability to attend regularly in the future. According to the Employer, the Grievor's frequent absences put a strain on his co-workers, because temporary absences in the department were difficult to fill, since specialized skills were required that were not held by many other plant employees.

AWARD: The grievance was allowed. The Arbitrator stated that the onus rested with the Employer to prove that the Grievor's condition was chronic. The Employer failed to prove on the balance of probabilities that the Grievor was incapable of maintaining a regular attendance record in the future. Although the Grievor's past absentee record was excessive, the Arbitrator found that it was not reasonable to infer that he could not attend work regularly in the future. Therefore, the Arbitrator ordered that the Grievor be reinstated to the position of Improver for a six-month probationary period, without loss of seniority, wages or benefits.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-06-002

EMPLOYER:	City of Thompson
UNION:	United Steelworkers of America, Local 7911
ARBITRATOR:	J.M. Chapman, Q.C.
APPEARANCES:	C. Lercher, for the Employer D. Brown, for the Union
ISSUES:	1. Jurisdiction of the Arbitrator: Reinstatement and Substitution of Penalty 2:1470 2. Discipline: Attendance at Work 7:3100 3. Discharge 7:3542 4. Disciplinary Penalties: The Doctrine of the Culminating Incident 7:4310 5. Use of the Prior Record 7:4314
DECISION RENDERED:	June 8, 1988 (Interim award - May 6, 1988)
EXPEDITED ARBITRATION:	Yes

CIRCUMSTANCES: The Grievor was frequently late or absent from work without reasonable explanations. On March 3, 1988, the Grievor slept in and since he knew that the Employer would have already considered him absent without leave, he did not contact his supervisor. Based upon this culminating incident, the Grievor's lengthy disciplinary record, and previous warnings, the Employer terminated the Grievor's employment. The Union filed a grievance alleging that the discharge was unjust and unreasonable. It argued that as per article 17.03 of the collective agreement, the Grievor's record should be "cleansed", and therefore not all of his disciplinary record could be considered in this matter. As well, it argued that the penalty was too harsh given the Grievor's improved attendance record and his numerous years of service.

AWARD: The grievance was allowed in part. The Arbitrator found the Grievor's past record was atrocious even when only considering the time period dictated by article 17.03. As well, he found the Grievor's absences were not innocent, and were excessive to the extent that discipline was merited. However, in view of the Grievor's lengthy record of service, the difficulty in finding other employment and that he was making an effort to improve, the Arbitrator ruled that he should be given one more chance. Therefore, the Arbitrator ordered the dismissal changed to a three-month suspension without the accrual of salary, seniority or benefits. In addition, upon reinstatement the Grievor would be on probation for six months.

AUTHORITIES: Brown & Beatty, Canadian Labour Arbitration, (2d) p. 477.

FILE NO. AA88-06-003

EMPLOYER: Manfor Ltd.

UNION: Canadian Paper Workers, Local 1403

ARBITRATOR: P.S. Teskey

APPEARANCES: R. Roy, for the Employer
C. Monk, for the Union

ISSUES:
1. The Collective Agreement: Intention of the Parties 4:2100
2. Organization and Direction of the Work Place: Work Hours and Shifts 5:3100
3. The Arbitration Process: Extrinsic Evidence 3:4400

DECISION RENDERED: June 6, 1988

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The grievance arose from a dispute on the interpretation of article 11:01(e) of the collective agreement, which dealt with the operating hours of the cafeteria. The article stated that if the "Maintenance afternoon shift" was eliminated, the cafeteria would close at 3:00 p.m. rather than 6:00 p.m. In May 1987, the Employer gradually began eliminating the afternoon shift, and by January 1988, only one employee, the Heavy Duty Mechanic, was working the "Maintenance afternoon shift." Subsequently, the Employer changed the cafeteria's hours. As a result, the Union filed a grievance alleging that the Employer violated article 11:01(e). The Union argued that because the afternoon shift schedule for the Maintenance and Engineering Department included the classification of Heavy Duty Mechanic, the mechanic was a member of the "Maintenance afternoon shift." Therefore, the Employer was obligated to extend the cafeteria's hours.

The Employer contended that the Mechanic was only included on the schedule for the sake of clerical convenience. It argued that the "Maintenance afternoon shift" was intended to include employees who worked in the Mill, where the cafeteria was located. The Mechanic worked out of a garage several blocks away, and he was supervised by the Woodyard Supervisor, not the Pulp and Paper Mechanical Maintenance Supervisor.

AWARD: The grievance was denied. Based on the extrinsic evidence, the Arbitrator found that the Employer's interpretation of the collective agreement was more reasonable and more accurate than the Union's. Therefore, he ruled that the Heavy Duty Mechanic was not a member of the "Maintenance afternoon shift."

AUTHORITIES: Re Labatt's Ontario Breweries Ltd. and United Brewery Workers, Local 304, (1973), 2 L.A.C. (2d) 119.

FILE NO. AA88-06-004

EMPLOYER:	Bristol Aerospace Limited
UNION:	Canadian Aerospace Workers, Local 5; and, Canadian Association of Industrial Mechanical and Allied Workers
BOARD:	J.M. Chapman, Q.C., Chairperson R. Whiteway, Nominee for the Employer Prof. J. Silver, Nominee for the Union
APPEARANCES:	G.D. Parkinson, for the Employer S.I. Soronow, for the Union
ISSUES:	1. Discipline: Insolent, Unco-operative Behaviour, Obscene Language 7:3660 2. Leave Work Without Permission 7:3130 3. Mitigating Factors 7:4400 4. The Employee: Employment Record 7:4428
DECISION RENDERED:	June 10, 1988
EXPEDITED ARBITRATION:	No

CIRCUMSTANCES: The Grievor had worked as a packer in the shipping department for a little over two years. One morning, the Grievor had been assigned to complete a rather difficult job outside the plant in the hot sun. When he returned inside, he noted two other employees working in his usual area, and allegedly started yelling profanities and racial slurs at them. The Grievor was angry that, while he had been outside, his usual job was being performed by other employees. He disputed using any form of a racial slur. The Grievor then went to discuss the incident with his union representative who apparently did not provide him with a satisfactory response, as he walked off the job and was absent without leave the following day. Following this incident, the Grievor's employment was terminated. Combined with a poor attendance record, the Grievor was deemed to be "intolerable." The Grievor claimed his poor attendance record was due to parental responsibility and ill health. The Grievor alleged that he had been unjustly dismissed.

The Union argued that the onus to prove just cause was on the Employer. The onus was to demonstrate that the facts were true and supported the disciplinary action. The Union submitted that, save for the question of attendance, the Grievor's record was good. The Union argued that the whole incident was based upon frustration and was not an incident that in itself merited discharge. As for the Grievor not attending work on Friday, the Union pointed out that when the Grievor said, "I'm not coming back until I speak to management", it simply meant that he wanted to have the matter resolved and that an employee was entitled to do this.

The Employer's position was that there was nothing to mitigate the Grievor's actions, which it viewed as insubordination. It believed that discharge was appropriate, because of the insubordination and his absence the following day. The Employer stressed that the Grievor had breached the principle of "work now, grieve later".

AWARD: The grievance was denied. The Board found that the Grievor was completely at fault in this incident. Upon examination of the circumstances surrounding the case, the Board could not find evidence of mitigating factors that would dictate a lesser penalty. The Board noted that the incident on the shop floor merited some discipline, but in isolation it may not have merited discharge. However, the Grievor's relatively brief record of service was blemished. Therefore, the Board found that the Employer was justified in terminating his employment.

DISSENT: Prof. J. Silver, Nominee for the Union. In Prof. Silver's opinion the Employer failed to prove that there was just cause for dismissal. He felt the incident on the shop floor was a brief spur-of-the-moment outburst. As there was no physical contact or threat thereof, no refusal to obey, and no premeditation, it did not constitute what the Employer termed "grossly insubordinate." He recognized that the Grievor was in the wrong, and he agreed that his actions warranted discipline, but not dismissal. As the Employer viewed this one day's absence in the context of the Grievor's previous attendance record, Prof. Silver felt that the previous record was of crucial importance. In his opinion, the absences connected to the Grievor's parents being ill were mitigating factors and should have been recognized as such by the Employer. Given the above considerations, there was not just cause for discharge.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-06-005

EMPLOYER: Burns Meats Limited

UNION: United Food & Commercial Workers International Union, Local 111

BOARD: D.E. Bowman, Q.C., Chairperson
R.A. Simpson, Nominee for the Employer
P. Moist, Nominee for the Union

APPEARANCES: G.D. Parkinson, for the Employer
R. Tonn, for the Union

ISSUES:
1. Seniority: Senior Employee With the Required Ability 6:3210
2. Recall of Persons on Lay-off 6:2350
3. Jurisdiction of the Arbitrator: Improper Lay-offs 2:1425

DECISION RENDERED: June 13, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Employer recalled five employees whose seniority was less than that of the five Grievors, who were also on lay-off. The Union filed a grievance alleging that the Employer had failed to recall senior employees in accordance with article 14.2 of the collective agreement.

The Employer argued that the recall was caused by an unanticipated number of orders that required employees with specific experience, and there was no time to train inexperienced employees. The Union argued that the work performed by the recalled employees required limited skill and experience. The Union also asserted that the Grievors were capable of performing the required work, as they had occupied similar jobs before the lay-off.

AWARD: The grievance was allowed. The Board found that article 14.2 was intended to provide a threshold test of qualifications coupled with the right of the senior employee to "learn the job within a reasonable time." As well, it imported urgency which could justify the Employer departing from a threshold test to the extent of choosing those with "immediate" qualifications despite seniority. The Board determined that that provision was intended to apply to a situation where the jobs in question were relatively high skilled and required extensive training and experience. The Board found that since the Grievors' qualifications were substantially similar to the recalled employees', and the jobs in question were the lowest level functions within the department, the Employer was in violation of the collective agreement. Therefore, the Board ordered the Employer to compensate the Grievors for their lost working days in the amount of nine days' wages.

DISSENT: R.A. Simpson, Nominee for the Employer. Mr. Simpson's view was that the interpretation of the second part of article 14.2 was taken out of context. According to Mr. Simpson, the Grievors lacked the skills required to perform the work, and the Employer was entitled to recall and did recall those employees with "immediate qualifications." Therefore, Mr. Simpson would have dismissed the grievance.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-06-006

EMPLOYER: Flin Flon General Hospital Inc.

UNION: Manitoba Food and Commercial Workers, Local 832

BOARD: G.C. MacLean, Q.C., Chairperson
J. Conner, Nominee for the Employer
W. Comstock, Nominee for the Union

APPEARANCES: R. Black, for the Employer
D. Primeau, for the Union

ISSUES:
1. Compensation: Progressive Wage Increases 8:2320
2. Equal Pay for Equal Work 8:1100

DECISION RENDERED: June 14, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The proceedings were a result of an agreement between the Employer and the Union to settle the issue of wages of the Hospital's Ambulance Attendants, a matter not settled during collective agreement negotiations. The Union was not satisfied with the current wage rates and was seeking a wage increase, such that the Ambulance Attendants would receive wages comparable to Ambulance Attendants employed by the City of Winnipeg. Central to the arguments presented by both parties were external and internal comparisons of wage rates and job descriptions.

AWARD: The grievance was allowed. Upon examination of the external information, the Board concluded that greater training and skills were required to fill the Winnipeg positions. However, the internal comparison between the pay and responsibilities of a Maintenance Tradesperson Helper's position with the Ambulance Attendant's position led the Board to conclude that the Ambulance Attendant's position required a higher degree of responsibility, skill and training. The Maintenance Tradesperson Helper was, at that time, paid $1.00 per hour more ($11.22) than a top rated Ambulance Attendant. Therefore, the Board concluded that the Ambulance Attendant's starting hourly wage be raised to $11.10 per hour through to $12.45 per hour after twenty-four months of service.

AUTHORITIES: Re Mr. Justice Dubin in the Metro Toronto Board of Education Arbitration (1976); and Mr. Owen Shine in an arbitration relating to British Columbia Railway Company.

FILE NO. AA88-06-007

EMPLOYER: INCO Limited

UNION: United Steelworkers of America, Local 6166

ARBITRATOR: Dr. P. Phillips

APPEARANCES: J.M. Christiansen, for the Employer
D. Brown, for the Union

ISSUES:
1. Jurisdiction of the Arbitrator: Missed Overtime Opportunities 2:1423
2. Organization and Direction of the Workplace: Proprietary Rights to Overtime Assignments 5:3220

DECISION RENDERED: June 14, 1988

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The number two rod mill (2A work unit) required a change and alignment of a pinion gear. The adjustment part of the job was a relatively infrequent maintenance task. The work was completed by two mechanical trades people, who had been preparing for the job, and two apprentices, all of whom were paid overtime rates. The Union filed a grievance alleging that the Grievor, who was a member of the 2A work unit, should have been granted the opportunity to work overtime, rather than the apprentice who was part of the 2B work unit. It argued that the Grievor should have been called in, as set out in clause 7.03 of the collective agreement which required the Employer to distribute the overtime work among the employees in the work unit.

The Employer argued that the apprentices were called in as a result of a last minute decision to take advantage of the opportunity to train them in the pinion alignment procedure. The Employer stated that the situation was covered by clause 22.11 of the collective agreement, which allowed for the training of apprentices in as many branches of their trade as the facilities of the plant would reasonably permit.

AWARD: The grievance was denied. The Arbitrator found that, as four workers were not required for the job, the Employer brought the apprentices in solely for training purposes. Therefore, it did not breach the collective agreement.

AUTHORITIES: None cited.

FILE NO. AA88-06-008

EMPLOYER: Associated Beer Distributors Ltd.

UNION: United Food & Commercial Workers' International Union, Local 330

ARBITRATOR: P.S. Teskey

APPEARANCES: G.D. Parkinson, for the Employer
D. Macri, for the Union

ISSUES:
1. Compensation: Wage Guarantees 8:1200
2. Withholding Wages 8:1420
3. Subsection 80(1) of The Labour Relations Act

DECISION RENDERED: June 16, 1988

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Grievor, who was on lay-off, refused to come to work on short notice, citing a previous social engagement as an excuse. Because of his refusal, he lost his payment under the Guaranteed Wage Plan. The Union filed a grievance alleging that the Grievor had reasonable cause for not reporting to work, and therefore, he should have received the Guaranteed Wage Plan payment. It argued that the Grievor had phoned in to check to see if he was required to work, and was told he was ten or eleven people away from being called in. Because he assumed that he did not have to work, he made arrangements for a barbeque. In addition, the Grievor was not provided with reasonable notice, and had reason to refuse the assignment.

The Employer argued that the Grievor was asking to be paid for not working, a request that, if allowed, would result in the Guaranteed Wage Plan "not being able to work."

AWARD: The grievance was denied. The Arbitrator found that the phone call and the subsequent barbeque arrangements did not provide reasonable cause for excuse. He also noted that the social plans were not of great importance and altering them would have created no more than a simple inconvenience to the Grievor.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-06-009

EMPLOYER:	Town of Leaf Rapids
UNION:	United Steelworkers of America, Local 8144
ARBITRATOR:	Dr. P. Phillips
APPEARANCES:	J. Palamar, for the Employer R. Mayer, for the Union
ISSUES:	1. Compensation: Fringe Benefits (Accommodation Allowance) 8:3000 2. Illness: Benefits and Other Rights 8:3300
DECISION RENDERED:	June 20, 1988
EXPEDITED ARBITRATION:	Yes

CIRCUMSTANCES: The Grievor, who was on long-term disability, grieved that his accommodation allowance was held back. The issue was whether he was entitled to this benefit while on long-term disability.

The Employer argued that, because the Grievor was not actively working, he was not entitled to the fringe benefit.

AWARD: The grievance was allowed. The Arbitrator concluded that the Grievor remained an employee under article 23(f), Long Term Disability, and was entitled to all employee benefits while he remained on disability.

AUTHORITIES: Brown & Beatty, Canadian Labour Arbitration (2nd ed.) pp. 587-8; Re Bendix Home Systems Ltd. and the U.B.C.J., Local 3054, 10 L.A.C. (2d).

FILE NO. AA88-06-010

EMPLOYER: Town of Leaf Rapids

UNION: United Steelworkers of America, Local 8144

ARBITRATOR: Dr. P. Phillips

APPEARANCES: J. Palamar, for the Employer
R. Mayer, for the Union

ISSUES:
1. The Collective Agreement: Pension, Insurance, and Welfare Plans 4:1400
2. Compensation: Illness: Benefits and Other Rights 8:3300
3. Medical Plans Outside the Agreement 8:3322

DECISION RENDERED: June 20, 1988

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Grievor, who was on long-term disability, was not being paid according to the collective agreement. He applied for and received benefits under the disability provisions of the Canada Pension Plan (C.P.P.), whereupon the insurance company which underwrote the group benefits provided in the collective agreement reduced its payment to him by the amount of the C.P.P. benefit. The Grievor requested that he be paid benefits according to the collective agreement, regardless of what he received from C.P.P.

The Union argued that the collective agreement provided that the Employer would provide a specific level of benefits; and there was no clause that lessened this amount by the benefits payable under C.P.P.

The Employer argued that the collective agreement was ambiguous, and that the understood meaning of the insurance plan was that it guaranteed the level of benefits inclusive of the C.P.P. benefit.

AWARD: The grievance was allowed. The Arbitrator concluded that the provisions of the collective agreement specifically provided for certain benefits. Therefore, the Employer was responsible for topping up the group benefit payments to the level guaranteed in the collective agreement.

AUTHORITIES: Re Welland Chemical Ltd. and Energy and Chemical Workers Union, Local 914;, Brown & Beatty, Canadian Labour Arbitration, p. 175-6.

FILE NO. AA88-06-011

EMPLOYER: Thompson General Hospital

UNION: Manitoba Food & Commercial Workers, Local 832

BOARD: J.M. Chapman, Q.C., Chairperson
G.D. Parkinson, Nominee for the Employer
C. Derham, Nominee for the Union

APPEARANCES: E.W. Olson, Q.C., for the Employer
D.A. Primeau, for the Union

ISSUES: 1. Interest Arbitration (Rates of Pay) 1:0000
2. Compensation: Equal Pay for Equal Work 8:1100

DECISION RENDERED: June 20, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The wage rate for Admitting Clerks was the sole issue brought to arbitration. The previous collective agreement had expired in April 1988, and negotiations between the parties had failed to realize a settlement.

In the Union's opinion, the wages paid to the Admitting Clerks were low when compared to similar jobs in the province. The Employer argued that the best indicator of the appropriate rate to be paid was what the parties had bargained. The Employer disputed that the Admitting Clerks were some of the lowest paid in the province.

AWARD: The Board declined to render a decision. From the evidence before it, it could not determine which party was correct or incorrect. The Board recommended that the parties make every effort to resolve the salary differences at the bargaining table.

AUTHORITIES: O. Shine, Q.C., arbitration relating to British Columbia Railway Company; and Mr. Justice Dubin in the Metro Toronto Board of Education arbitration (1976).

FILE NO. AA88-06-012

EMPLOYER: New Flyer Industries

UNION: Canadian Association of Industrial Mechanical and Allied Workers, Local 3

ARBITRATOR: J.M. Chapman, Q.C.

APPEARANCES: K. Lercher, for the Employer
S. Spratt, for the Union

ISSUES:
1. Discipline: Attendance at Work: Innocent Absenteeism 7:3210
2. Discharge 7:3542
3. Jurisdiction of the Arbitrator: Reinstatement and Substitution of Penalty 2:1470
4. Employee's State of Mind 7:4424

DECISION RENDERED: June 24, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor had a work record characterized by excessive absenteeism that spanned a period of three and one-half years. The Employer had discussed the problem with the Grievor on several occasions. This problem resulted in the Employer issuing a letter to the Grievor informing him that his attendance would be closely monitored for three months. Subsequently, the Grievor's employment was terminated when his attendance did not improve to the Employer's satisfaction. The Union filed a grievance alleging that the Grievor had been unjustly discharged. It submitted that the Grievor's excessive attendance problem was due to depression. In addition, after the final warning letter, the Grievor's attendance improved, and any absences were due to legitimate physical illness.

The Employer argued that the onus was on the Grievor to show that he would be able to maintain a satisfactory attendance record. The Employer believed that, because the depression prognosis was based upon subjective evidence, it was suspect. Also, based upon the Grievor's record, they believed that his attendance habits would not improve.

AWARD: The grievance was allowed in part. Although the Arbitrator found that the Grievor had been unduly absent in the past, he was satisfied that he had attempted to improve his absenteeism record after receipt of the warning letter. Based upon medical evidence, the Arbitrator was satisfied that the Grievor was capable of regular attendance in the future. Therefore, the Arbitrator ordered that the Grievor be reinstated in his employment. However, the request for lost wages and other accrued seniority and benefits was denied. In addition, the Arbitrator imposed a set of probationary terms that constituted a clear warning that failure to comply with the Employer's rules would result in future termination.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-06-013

EMPLOYER:	Manitoba Public Insurance Corporation
UNION:	The Manitoba Government Employees' Association
BOARD:	J.M. Chapman, Q.C., Chairperson R. Simpson, Nominee for the Employer L. Cherniack, Nominee for the Union
APPEARANCES:	G.D. Parkinson, for the Employer R. Erb, for the Union
ISSUE:	1. Seniority: The Skills and Ability Requirement: Senior Employee If Relatively Equal 6:3220
DECISION RENDERED:	June 24, 1988
EXPEDITED ARBITRATION:	No

CIRCUMSTANCES: The Grievor applied for, but was denied the position of Claims Supervisor, which was awarded to a junior applicant. The Union filed a grievance alleging violation of article 12:10 of the collective agreement, which required the Employer to select the most senior applicant when applicants have similar ability and work performance. The Union argued that there was no significant and demonstrated difference in ability and work performance between the Grievor and the successful applicant. Further, because the candidates were equal in ability, the Grievor should have been granted the promotion on the basis of seniority. And finally, the Union alleged that the successful candidate had an unfair advantage because his superiors had sat on the selection panel.

The Employer contended that it had not violated article 12:10 as it was a "competitive" clause and not a "threshold" clause, and therefore, had chosen the most qualified applicant on the basis of ability and work performance. In addition, the successful applicant had prior supervisory experience which was a job requirement, whereas the Grievor had none. As for the alleged bias, the Employer disputed that any such bias existed.

AWARD: The grievance was denied. The Board found the job requirements were reasonable and that the successful applicant had met those qualifications, while the Grievor had not. Any evidence of bias in the selection process was not demonstrated. The Board was satisfied that at the time of the application and the awarding of the position, the Employer had chosen, on the basis of the competitive nature of article 12:10, the applicant who demonstrated that he was most qualified "on the basis of ability and work performance."

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-06-014

EMPLOYER: INCO Ltd.

UNION: United Steelworkers of America, Local 6166

ARBITRATOR: S.G. Sigurdson, Q.C.

APPEARANCES: M. Christiansen, for the Employer
D. Brown, for the Union

ISSUES:
1. Discipline: Reasonable Explanation of Absence 7:3112
2. Warnings, Suspension, Discharge 7:3542
3. Reinstatement and Compensation 7:6000
4. Compensation: Withholding Wages 8:1420

DECISION RENDERED: June 28, 1988

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Grievor had missed two unexplained periods of work within a time span of one month. This unacceptable conduct placed him in Step III of the Absenteeism Program which specified that any further unexplained absences within six months would result in termination of employment. Aware of these conditions, the Grievor was absent from work while in Step III of the Absenteeism Program. Although he presented a medical slip, the dates of sickness were incorrect, and the Grievor was subsequently discharged. One month later, the Grievor presented another medical slip with the correct dates and disclosed that he had visited the emergency ward of the local hospital at the onset of his illness. Based upon this new information, the Employer reinstated the Grievor in his employment. However, the Grievor requested that he be paid all monies and benefits for the lost time as a result of his unjust dismissal.

AWARD: The grievance was allowed in part. The Arbitrator found the length of suspension, in all of the circumstances, somewhat excessive. The Grievor's lack of candor was a countervailing consideration. However, the fact was also considered that the Grievor presented another medical certificate to prove his absences were legitimate. Therefore, the Arbitrator found that the suspension should have been for fifteen days.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-07-001

EMPLOYER: The Manitoba Civil Service Commission

UNION: The Manitoba Government Employees' Association

ARBITRATOR: S.G. Sigurdson, Q.C.

APPEARANCES: Mr. Cram, for the Employer
Mr. Rodgers, for the Union

ISSUES:
1. Compensation: Entitlement to Wages 8:1000
2. Weekly Overtime 8:2120
3. Revision of Classification and Rates 5:2440
4. Jurisdiction of the Arbitrator: Collective Agreement Limitations 2:3100

DECISION RENDERED: July 4, 1988
(Supplementary Award - February 23, 1989)

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: In November 1984, the Grievor, who was a Correctional Officer 2, was assigned the responsibilities of a Systems Analyst 2. However, he was not officially reclassified until almost two years later. Prior to his official reclassification, the Grievor continued to work the standard working hours of a Correctional Officer 2, which were 40 hours per week. However, during this period, he was only paid for 36.25 hours per week, the standard work week for a Systems Analyst 2. The Union filed a grievance alleging that the Grievor was entitled to receive overtime pay at the rate of 3.75 hours per week for the two year period.

Prior to the commencement of the proceedings, the Employer raised an objection to the jurisdiction of the Arbitrator and to the arbitrability of the grievance. The Employer argued that the matter should have been dealt with under section 45:03 of the collective agreement which stated that the Civil Service Commission would hear disputes concerning reclassifications of employees.

AWARD: The grievance was found to be arbitrable. The Arbitrator found that the issue was the entitlement to retroactive pay arising from a reclassification rather than one of reclassification. Therefore, he ruled that he had the jurisdiction to hear the grievance on the merits of the case.

Authorities: None cited.

FILE NO. AA88-07-002

EMPLOYER: Burns Meats

UNION: United Food & Commercial Workers International Union, Local 111

ARBITRATOR: Prof. J. Atwell

APPEARANCES: K. Lercher, for the Employer
C. Trigwell, for the Union

ISSUES:
1. Discipline: Sabotage 7:3410
2. Fighting, Assault 7:3430
3. The Employee: Rehabilitative Potential 7:4422
4. Discharge 7:3542

DECISION RENDERED: July 5, 1988

EXPEDITED ARBITRATION: Yes

__CIRCUMSTANCES__: The Grievor was seen by two other employees sabotaging a machine by cutting a hose with a meat hook. When confronted by the foreman on duty, the Grievor denied the charge and became angry, swearing at and allegedly pushing the foreman backwards. On his way out, he threatened one of the witnesses. The Grievor was discharged for sabotage, using physical force against the foreman, and threatening a fellow worker. The Union filed a grievance alleging that the Grievor was unjustly dismissed. It argued that the Grievor had a good work record and was sorry for what he did. Therefore, there was chance for rehabilitation.

The Employer argued that because the Grievor eventually admitted to the act, it was the breach of trust that is important, not the degree of damage or the consequences. The act of sabotage was cause enough to uphold the dismissal, but the events viewed cumulatively also point to discharge. Further, sabotage is one of the worst abuses of trust between an employee and employer. It is worse than theft because there is no personal gain to the individual; the intent is to harm the employer.

__AWARD__: The grievance was denied. The Arbitrator found no conclusive evidence in the Grievor's brief period of service that would indicate potential for rehabilitation. It was the Arbitrator's decision that the Employer was justified in terminating the Grievor's employment.

__AUTHORITIES__: None cited.

FILE NO. AA88-07-003

EMPLOYER: Bristol Aerospace Limited

UNION: Canadian Aerospace Workers; and,
Canadian Association of Industrial, Mechanical and Allied Workers, Local 5

BOARD: J.M. Chapman, Q.C., Chairperson
W.S. Gardner, Nominee for the Employer
Prof. J. Silver, Nominee for the Union

APPEARANCES: G.D. Parkinson, for the Employer
R. Gutkin, for the Union

ISSUES:
1. The Arbitration Process: Preliminary Objections 3:2100
2. Jurisdiction of the Arbitrator: Arbitrability: Abandonment, Settlement & Withdrawal 2:3230
3. Organization & Direction of the Workplace: Vacancies 5:2510
4. Job Posting 5:2520
5. Scheduling Work: Person Normally Performing the Work 5:3222

DECISION RENDERED: July 7, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: A preliminary objection was made by the Employer that the Board had no jurisdiction to hear the matter, as the hearing would have constituted the third time that the issue had been grieved. After reviewing the relevant authorities, the Board found that the event grieved in this case remained unresolved, hence, distinguishing it from the prior grievances. Therefore, the Board did not uphold the preliminary objection.

The Grievor, who was as a Charge Hand, assumed the duties of an Inspector who had been transferred out of the department. The Union filed a grievance alleging that the Employer failed to post the position of Inspector when the vacancy occurred in accordance with the collective agreement. The Union submitted that the Employer had "monkeyed" around with the job descriptions without negotiation, and requested that the job be posted and a declaration be made that employees not be permitted to work outside of their classifications.

The Employer argued that requiring a Charge Hand to conduct inspection duties was not a violation of the collective agreement.

AWARD: The grievance was denied. The Board found that the collective agreement did not include any restrictions on the Employer from transferring employees from one job to another. Also, it seemed clear that the parties had recognized that employees would, from time to time, be required to work in different classifications as long as they were qualified. It was the Board's view that no vacancy existed as there was not adequate work available to justify a new position. In view of these findings, the Board concluded that the Employer did not violate the collective agreement.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-07-004

EMPLOYER: City of Winnipeg

UNION: Amalgamated Transit Union, Local 1505

ARBITRATOR: M.H. Freedman, Q.C.

APPEARANCES: M. Samphir/M.E. Cavett, for the Employer
M. Myers, Q.C., for the Union

ISSUES:
1. Compensation: Entitlement to a Job 8:3340
2. Proof of Recovery 8:3342
3. The Arbitration Process: Standard of Proof 3:2500

DECISION RENDERED: July 8, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievors, who were bus operators, had both suffered back injuries that had resulted in lengthy absences. However, both Grievors claimed that through exercise and weight control programs they had become free of back pain. Therefore, they wanted to return to their jobs as bus operators. The Workers Compensation Board found both Grievors to have recovered from their back injuries, and therefore, discontinued their benefits. However, the Employer argued that the underlying medical condition posed a risk of re-injury. It did not want to take this financial risk, and refused to allow them to return to work. The Union filed a grievance alleging that the Grievors had been improperly refused to return to work.

AWARD: The grievance was allowed. The issue before the Arbitrator was whether the Grievors were capable of returning to work and performing the job without any measurable danger to the public, to the Employer or the Employer's property. The Arbitrator concluded that there was no direct evidence to indicate that the Grievors were unable to perform their work. Therefore, he ordered that the Grievors be allowed to return to their positions as bus operators.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-07-005

EMPLOYER: Manitoba Civil Service Commission

UNION: The Manitoba Government Employees' Association

ARBITRATOR: S.G. Sigurdson, Q.C.

APPEARANCES: R. Cram, for the Employer
G. Rodgers, for the Union

ISSUES:
1. Compensation: Fringe Benefits (parking) 8:3000
2. Jurisdiction of the Arbitrator: Arbitrability: Collective Agreement Limitations 2:3100
3. Abandonment, Settlement & Withdrawal 2:3230
4. Applications of Estoppel 2:2220

DECISION RENDERED: July 11, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievors, a group of teachers employed by Red River Community College, were moved to a new downtown location. They were concerned about the availability of parking, but were assured that parking would continue to be provided and paid for by the Employer. However, ten months after the move, it was announced that the Grievors would have to pay for parking. Subsequently, the Union grieved that they were entitled to be reimbursed for their parking expenses. This situation was viewed to be in violation of article 8:02 of the collective agreement and section PA30-25 of the General Manual of Administration. The Union acknowledged that there was no specific provision in the collective agreement relating directly to the issue of parking. However, the Union argued that the question of estoppel arose in the evidence.

The Employer submitted that the matter in dispute was outside of the Arbitrator's jurisdiction because of settlement of a prior grievance dealing with this issue.

AWARD: The grievance was found to be inarbitrable. The Arbitrator concluded that he was without jurisdiction based upon the evidence that the essential matter in dispute in both grievances was, in substance, identical, and especially since the prior grievance had resulted in the Grievors resolving the issue for a specified time period. The Arbitrator noted that the only difference was in respect of the time period for which the employees sought reimbursement.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-07-006

EMPLOYER: Hudsons Bay Mining & Smelting Company Ltd.

UNION: International Association of Machinists & Aerospace Workers, Lodge 1848

ARBITRATOR: G.C. MacLean, Q.C.

APPEARANCES: W.L. Ritchie, for the Employer
L. Paulson, for the Union

ISSUES:
1. Compensation: Illness: Entitlement to a Job 8:3340
2. Proof of Recovery 8:3342
3. Entitlement to Wages 8:1000

DECISION RENDERED: July 11, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor was employed as a maintenance mechanic. He suffered an injury to his right knee while working, which resulted in a lengthy absence. Approximately ten months later, the Grievor informed the Employer that his knee was better, and he wanted to return to work. The Employer was reluctant to allow him back without further medical evidence to support his claim of recovery. The Grievor obtained a medical certificate which specified the date he was fit to work. Despite this certificate, the Employer still refused to allow the Grievor back to work. The Employer wanted to examine the Grievor's medical records, but the Grievor refused. The latter finally did sign a waiver releasing his medical records. As a result, the Employer was convinced of his fitness to work and allowed him to return to work. However, sixteen work days had been lost as a result of the Employer not recognizing the date specified on the return-to-work certificate obtained from his doctor. Therefore, the Union alleged that he was entitled to sixteen days' pay for his delayed return to work.

AWARD: The grievance was allowed in part. The Arbitrator found that the Employer had reason to request further assurances, as the medical certificate did not elaborate on the change in the Grievor's condition. The Employer failed to clearly transmit what further information was required, and therefore, delayed the Grievor's return to work. The Arbitrator believed that even if the Grievor did provide the further medical documentation that was requested it would have taken time and he would not have been able to return to work on the specified date. Therefore, the Arbitrator found the Grievor to be entitled to compensation for ten shifts.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-07-007

EMPLOYER: Manitoba Telephone System

UNION: International Brotherhood of Electrical Workers, Local 435

ARBITRATOR: J.M. Chapman, Q.C.

APPEARANCES: J. McGuire, for the Employer
P. Teskey, for the Union

ISSUES:
1. Discipline: Discharge 7:3542
2. Discipline: Theft 7:3310
3. Employee's State of Mind 7:4424
4. Untrustworthiness and Conflict of Interest 7:3330
5. Jurisdiction of the Arbitrator: Reinstatement and Substitution of Penalty 2:1470

DECISION RENDERED: July 13, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor was caught attempting to sell scrap copper to a scrap yard and was convicted on theft charges. As a result of the incident, the Grievor was dismissed. Preceding the theft, the Grievor had been recently diagnosed as having cancer. Because of his health problems, the Grievor was suffering from depression. The Union alleged that the Employer did not give full consideration to the circumstances surrounding the incident, and therefore, the Grievor was unjustly dismissed. It argued that there were mitigating and extenuating circumstances. The Union stressed that the Grievor had gone into a "mental tailspin" and had acted out of character. The Grievor's doctor had confirmed that there was a "medical depression" brought about by the diagnosis of cancer and subsequent related health problems. In addition, the Grievor had an unblemished work record prior to the incident leading to his dismissal.

The Employer argued that it had considered the alleged mitigating circumstances, but the fact remained that it could not afford to employ a person who could not be trusted.

AWARD: The grievance was allowed. The Arbitrator was satisfied that there was medical evidence of the Grievor's depression. Because of the Grievor's state of mind, the Arbitrator had some doubt as to whether he was capable of making an informed decision. In view of that doubt, the Arbitrator ruled that the Grievor be reinstated to his former position on very stringent terms. The terms included no compensation for the period of suspension and a reduction in seniority to only three years. The Arbitrator emphasized that, if there was no medical evidence of a mental disorder, he would not have hesitated to uphold the termination.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-07-008

EMPLOYER: St. Adolphe Nursing Home

UNION: Service Employees' International Union,
Locals 308 & 600

BOARD: D.E. Bowman, Q.C., Chairperson
D.H. Kells, Nominee for the Employer
R. Malazdrewich, Nominee for the Union

APPEARANCES: L. Lamb, for the Employer
R. Tonn, for the Union

ISSUES:
1. The Collective Agreement: Term & Termination 4:1620
2. Primary Sources of Jurisdiction: The Collective Agreement 2:1200
3. Subsections 61(1-2) and 121(1-2) of The Labour Relations Act

DECISION RENDERED: July 13, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The collective agreement between the parties had an expiry date of March 31, 1988. The Union had given notice of its intent to commence collective bargaining in a letter dated February 1, 1988. The Employer advised the Union that the bargaining notice was not timely, because according to article 38.03 of the collective agreement, written notice was required at least sixty days prior to the expiration date of the agreement. As a result of the missed deadline, the Employer claimed that the agreement would be renewed without changes for another year. The Union grieved that the Employer had misapplied articles 38.03 and 1.01 by refusing to meet and commence negotiations in good faith. It argued that article 38.03 did not provide a "period of notice" and was not validated by subsection 61(2) of The Labour Relations Act, and therefore, it was entitled to rely on the latter.

The Employer argued that article 38.03 implied a period of notice because the Union could give such notice at any time from the day following the commencement of a new agreement up to sixty days prior to its expiration. Also, the Employer suggested that the Board lacked jurisdiction to grant the relief claimed in the grievance because that would amend the collective agreement.

AWARD: The grievance was allowed. The Board found that the intention of article 22.02, which dealt with the authority of arbitration boards, and subsections 121(1) and (2) of The Labour Relations Act, was to require an arbitration board to determine the disputed question in as final a manner as possible and in a way that would promote labour/management harmony and limit the opportunities for "legalistic" approaches and interpretations. The Board concluded that the provisions of the section and the collective agreement conferred upon them the power to relieve against the Union's failure to give notice of bargaining in accordance with the collective agreement. The Board noted that it did not amend the collective agreement, but merely provided relief against the operation of one of its provisions in a particular set of circumstances. Also, to prohibit members of a local from entering into bargaining, which it had expected, would be a serious blow to the policy of The Labour Relations Act. Therefore, the Board directed the Employer to meet with the Union, to exchange written proposals, and to commence to bargain collectively in good faith.

DISSENT: D.H. Kells, Nominee for the Employer. Mr. Kells disagreed with the Chairman's conclusions regarding the powers of the Board to grant remedial relief pursuant to subsection 121(2) of The Act. In addition, the decisions of the Manitoba Court of Queen's Bench and the Manitoba Court of Appeal in the MacMillan Bathurst case were not determinative of the issue. Therefore, the Board should not be constrained by that decision. Also, the Chairman had failed to make a finding as to whether the Employer had misinterpreted the collective agreement. For the above reasons, he would have dismissed the grievance.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-07-009

EMPLOYER: Burns Foods Ltd.

UNION: United Food & Commercial Workers International Union, Local 111

ARBITRATOR: P.S. Teskey

APPEARANCES: K.L. Lercher, for the Employer
C. Trigwell, for the Union

ISSUES:
1. Discharge 7:3542
2. The Doctrine of the Culminating Incident 7:4310
3. Compensation: Medical Plans Outside the Agreement 8:3322
4. Jurisdiction of the Arbitrator: Reinstatement and Substitution of Penalty 2:1470
5. Dishonesty 7:3300

DECISION RENDERED: July 14, 1988

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Grievor was receiving Workers' Compensation Benefits due to a back injury at work. While receiving compensation, the Grievor was employed one evening a week as a bouncer at a hotel. When the Employer became aware of this situation, it believed that if the Grievor possessed the ability to work as a bouncer then he should be able to work at his regular job. The Grievor had a prior record of warnings for absenteeism. The Employer alleged that the intent to defraud was the culminating incident, and therefore, dismissed the Grievor. The Grievor alleged that he was dismissed without just cause.

The Union argued that a culminating incident did not exist. It was clear that the Grievor was legitimately injured and made efforts to return to work when possible. Medical evidence was presented to show that the Grievor attended physiotherapy sessions on a regular basis, and therefore, was making serious efforts to recover. In addition, the part-time job did not interfere with his recovery process or his regular job because the bar job was non-physical and he had held the bar job prior to his injury. Also, the company had suffered no detriment whatsoever, as there was no provision for top-up pay in the collective agreement.

AWARD: The grievance was allowed. Upon examination of the evidence, the Arbitrator found the Grievor's actions were not blameworthy. The bar job was non-physical in nature and not comparable to the physicality of the Grievor's regular job. The Arbitrator agreed with the Union's comment that it would be hard to believe that the Grievor would risk his regular job or his Workers Compensation Benefits for the minimal amount he was earning at the bar. The Arbitrator found that the Grievor did not act in a dishonest manner because he had made efforts to return to work and had kept in reasonable contact with the Employer. Therefore, there was no culminating incident worthy of discipline and the Grievor was ordered to be reinstated without loss of seniority or other benefits. Compensation was paid to the Grievor for lost wages as a result of termination.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-07-010

EMPLOYER: City of Winnipeg

UNION: Canadian Union of Public Employees, Local 500

ARBITRATOR: M.H. Freedman, Q.C.

APPEARANCES: M. Samphir/M.E. Cavett, for the Employer
M. Myers, Q.C., for the Union

ISSUES:
1. Discipline: Intoxicants 7:3560
2. Off-duty Behaviour 7:3010
3. The Collective Agreement: Company Rules 4:1500

DECISION RENDERED: July 14, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievors, two maintenance men, were seen by their supervisor and foreman drinking beer on an unpaid lunch hour. The Grievors were immediately suspended for two and one-half days for violating the Employer's policy regarding alcohol in the workplace. The Union filed a grievance alleging that the discipline was unwarranted. It argued that the Grievors had consumed only one beer each, were not impaired, and would have been fit to work. Moreover, the Grievors did not violate the policy because they did not have direct public contact while on the job.

The Employer argued that the Grievors could have frequent contact with the public, and therefore, they were in violation of the policy.

AWARD: The grievance was allowed. The Arbitrator found that, while the Employer's policy did not apply to lunch break activities, it seemed that the discipline was imposed because the supervisor assumed the Grievors were drinking during working hours. However, this was an unreasonable application of the policy because they were on their own time and there was no proof that the employees were going to return to the workplace smelling of alcohol. The Arbitrator concluded that the Grievors were not given a chance to conform to the policy. The Arbitrator further concluded that the Grievors had done nothing wrong, and therefore, the suspension was unjustified.

AUTHORITIES: Palmer, Collective Agreement Arbitration in Canada, p. 378; Re Associated Beer Distributors Ltd. and Brewery and Soft Drink Workers, Locasl 330, (1986), 25 L.A.C. (3d) 225.

FILE NO. AA88-07-011

EMPLOYER:	Coldstream Products of Canada Ltd.
UNION:	The Canadian Association of Industrial, Mechanical and Allied Workers, Local 1
BOARD:	A.R. McGregor, Q.C., Chairperson G.D. Parkinson, Nominee for the Employer R. McGregor, Nominee for the Union
APPEARANCES:	G. Mitchell/J. Palamar, for the Employer S. Soronow, for the Union
ISSUES:	1. Discipline: Fighting, Assault 7:3430 2. Discharge 7:3542 3. Jurisdiction of the Arbitrator: Reinstatement & Substitution of Penalty 2:1470 4. Subsections 80(1) and 121(1-3) of The Labour Relations Act
DECISION RENDERED:	July 14, 1988
EXPEDITED ARBITRATION:	Yes

CIRCUMSTANCES: The Grievor and a co-worker became involved in an argument that led to a physical fight. The fight ended when the Grievor cut the other employee on the cheek with a metal file. The next day, the Grievor's employment was terminated for provoking a fight and for possession of a weapon. The Union filed a grievance alleging that the Grievor was unjustly dismissed. It argued that the use of the file was not intentional, but resulted from a reflex action caused by the Grievor being punched in the bicep. The Union acknowledged that while the resulting injury was unfortunate, it was not serious enough to warrant the dismissal. Further, it argued that the Board could only impose a lay-off of one week under clause 33.04.

The Employer argued that the Grievor used the file as a weapon contrary to clause 33.02 of the collective agreement. Also, it submitted that the issue was one of credibility between the Grievor and his co-worker.

AWARD: The grievance was allowed in part. After reviewing the evidence, the Board found that the incident was not premeditated. However, that did not provide an excuse for the Grievor's actions, especially when he did not apologize to his co-worker. Therefore, the Board ordered that a three-month suspension without pay be substituted for the discharge.

DISSENT: G.D. Parkinson, Nominee for the Employer. It was Mr. Parkinson's view that the file incident constituted a serious assault. Combined with the Grievor's lack of remorse, Mr. Parkinson believed that the discharge was justified.

R. McGregor, Nominee for the Union. Mr. McGregor found that since the other party received no punishment for his part in the altercation, and since the Grievor's status was greater because of his longer service and position as a Lead Hand, then his punishment should have only been slightly greater than the minimum stipulated in article 33.04. Therefore, Mr. McGregor recommended that the punishment be reduced to a suspension of no more than two weeks.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-07-012

EMPLOYER: Burns Foods Ltd.

UNION: United Food and Commercial Workers, Local 111

ARBITRATOR: P.S. Teskey

APPEARANCES: K.L. Lercher, for the Employer
C. Trigwell, for the Union

ISSUES:
1. Grounds for Discipline: Sabotage 7:3410
2. The Doctrine of the Culminating Incident 7:4310
3. Use of the Prior Record 7:4314
4. Burden of Proof 7:2300
5. Jurisdiction of the Arbitrator: Reinstatement and Substitution of Penalty 2:1470

DECISION RENDERED: July 18, 1988

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Employer alleged that the Grievor was involved in the sabotage of a ham stuffing machine, which had a hose cut and another torn. One witness claimed to have heard the Grievor tell another employee to tear the hose, while another testified that he saw the Grievor kneeling behind the machine. Based upon the testimony of the witnesses, the Employer accused the Grievor of damaging the machine and of encouraging another employee to do the same. As a result of this incident, and based upon his past employment record, the Grievor was discharged. The Union filed a grievance claiming that the discharge was unjust. It denied that the Grievor was involved in the incident. The Union stated that the Grievor was unplugging a clogged sewer which was in the vicinity of the machine. It explained that this act was inconsistent with any acts of sabotage. As well, his record did not show any previous acts of mischief, sabotage, or related misconduct.

AWARD: The grievance was allowed. The Arbitrator found that the evidence presented did not clearly establish that the Grievor was involved in the act of sabotage. As well, his actions in terms of unclogging the drain, cleaning up the area, and reporting other acts of sabotage that occurred during the shift, were not consistent with culpable intent. The Arbitrator ruled that the Employer had not met the onus of proving the conduct of the Grievor warranted his discharge. Therefore, he ordered the Grievor to be reinstated without loss of seniority or other benefits and to be compensated for lost wages.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-07-013

EMPLOYER: Manfor Ltd.

UNION: International Woodworkers of America, Local I-324

ARBITRATOR: P.S. Teskey

APPEARANCES: S.G. Sigurdson, Q.C., for the Employer
R. Tonn, for the Union

ISSUES:
1. Seniority: Lay-off 6:2200
2. Notice of Lay-off 6:2320
3. Jurisdiction of the Arbitrator: Damages 2:1410
4. Improper Lay-offs 2:1425
5. Subsection 109(2) of The Labour Relations Act

DECISION RENDERED: July 27,1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: During a major plant renovation, the production staff were reassigned to other departments. The Grievor was reassigned to Maintenance to assist the Carpenter. Due to problems with the new conveyor system, the Employer decided to shut down the mill for four weeks. The Employer posted a general notice advising of the lay-off of 54 Production employees. Seven individuals, who were not specified, would be laid off for two months. Ten days later, the names of the seven were posted. The Grievor, who was one of the seven, was unaware of his pending lay-off, because he was on vacation. Although notice was mailed to the Grievor, he had not picked up his mail prior to reporting for work. Upon his arrival, he was advised of the lay-off. At this point, the Union filed a grievance alleging that the Employer violated article 17:13 of the collective agreement, which required the Employer to notify an employee of a lay-off at least 14 days in advance. It argued that the Employer was aware of the particulars of the lay-off 10 days before the notice was posted and could have sent the required notice to the Grievor. Because the Employer had not done everything reasonable to notify the Grievor, he had lost the opportunity to plan his affairs. The Union also claimed that the lay-off was unjust because the Grievor was told by the Maintenance supervisor that he was working in Maintenance and Maintenance personnel would not be placed on lay-off. The supervisor testified that he simply told the Grievor that Maintenance would not be laid off.

The Employer argued that the Grievor had not met his obligation to reasonably interpret or understand the lay-off, because he did not clarify his position at the general meeting held to inform employees of the lay-off. It also suggested that the Grievor knew he was still considered a Production worker, because he had his vacation approved by his Production supervisor. The Employer claimed that because the Grievor's seniority precluded working through the shut down and he did not seek alternate employment, the lack of notice of the lay-off did not affect him.

AWARD: The grievance was allowed. The Arbitrator found the Grievor was understandably confused and truly believed he worked in Maintenance. He ruled that the Employer did not give the required notice, and the notice given lacked specificity or individuality. In addition, the Employer was aware that the Grievor was on holidays and would receive the notice only shortly before the lay-off was to commence. Because the Grievor could have used the time on lay-off instead of his vacation days and could have extended his time away had he known about the lay-off, the Arbitrator ordered the Employer to pay the Grievor one weeks' wages.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-07-014

EMPLOYER: St. Boniface General Hospital

UNION: Manitoba Food & Commercial Workers, Local 832

ARBITRATOR: C.B. Cramer, Q.C.

APPEARANCES: M. Werier/M. Finlayson, for the Employer
M. Myers, Q.C., for the Union

ISSUES:
1. Compensation: Illness: Benefits and Other Rights 8:3300
2. The Collective Agreement: The Object of Construction: Intention of the Parties 4:2100
3. Subsection 113.5(5) of The Labour Relations Act

DECISION RENDERED: July 27, 1988

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: Under clause D-5 of the collective agreement, the Employer agreed to contribute 1 and 1/4% of payroll costs to provide for a long-term disability plan. The Union filed a grievance alleging that the Employer had failed to contribute the funds. The Union argued that funding should have commenced as of April 1, the effective date of the collective agreement. The Employer claimed funding should only begin at the implementation of the plan. Since the plan had not yet been implemented, the funding was not due at that time.

AWARD: The grievance was allowed in part. The Arbitrator stated that the parties had failed to precisely incorporate the details of the plan into the collective agreement. However, from the draft of the plan, the effective date was noted as April 1, 1987. The date was uncontradicted by the Employer upon its review of the contents, and therefore, by its silence, the Employer had given its approval. Therefore, the Arbitrator ordered the Employer to remit its contributions retroactive to April 1, together with interest. The contributions would be lowered by any paid sick leave benefits exceeding the thirty day ceiling set in the plan.

AUTHORITIES: Re Bestview Holdings Ltd., Cornwall, and Ontario Nurses' Association, 1 L.A.C. (3d) 218.

FILE NO. AA88-07-015

EMPLOYER: D. Cohn Trans Canada Ltd.

UNION: United Food and Commercial Workers
International Union, Local 111

ARBITRATOR: J.M. Chapman, Q.C.

APPEARANCES: L. Cohn, for the Employer
B. Zimmer, for the Union

ISSUES:
1. Compensation: Alteration of Wages 8:1400
2. The Collective Agreement: The Object of Construction: Intention of the Parties 4:2100
3. Management Rights 4:2310
4. Subsection 69.2(2) of The Labour Relations Act

DECISION RENDERED: July 28, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The members of the bargaining unit were paid on a "group piecework" system, that is, different rates were paid for different jobs and all the monies went into a "pot" from which the employees were reimbursed for hours worked. Because work performed by non-bargaining unit employees also went into the "pot", the Union gave an allowance to the Employer for various items, one being a deduction for forty hours for the wages of the shipper, who was not a member of the bargaining unit. The Union claimed that the Employer increased the allowance to eighty hours without its consent. The Union filed a grievance alleging that the Employer had violated article 6.02 of the collective agreement, which prohibited the payment of wages to non-bargaining unit members out of the "pot" without the Union's approval.

The Employer argued that it had agreed to reduce the allowance to forty hours when the shipper was not working his normal hours. However, when his hours returned to the normal level, the Employer believed it was entitled to increase the allowance to previous levels as provided for in paragraph two of article 6.02. The article stated that prior arrangements in effect before ratification of the agreement would not be affected.

AWARD: The grievance was denied. The Arbitrator found, by the plain and simple meaning of article 6.02, that the Employer had the right to reimpose the eighty-hour allowance without the consent of the Union. Therefore, he ruled that the Employer had the right to claim the eighty-hour allowance.

AUTHORITIES: Professor A.W.R. Carruthers, Labour Arbitration in Canada (1961), pp. 47, 79, 80, 123; Bell and Sneling v. Lever Bros. Ltd. (1932) AC 161, 101 LJKB 129 p. 226; and C.E. Odgers, The Construction of Deeds and Statutes, 4th Edition.

FILE NO. AA88-07-016

EMPLOYER: The Health Sciences Centre

UNION: The International Union of Operating Engineers, Local 827

BOARD: D.E. Bowman, Q.C., Chairperson
G.D. Parkinson, Nominee for the Employer
E. Kostyra, Nominee for the Union

APPEARANCES: P. Edwards, for the Employer
R. Tonn, for the Union

ISSUES:
1. Discipline: Discharge 7:3542
2. Probationary Employees: Standard of Review of Disciplinary Action 7:5020
3. The Collective Agreement: The Object of Construction: Intention of the Parties 4:2100
4. Jurisdiction of the Arbitrator: Arbitrability 2:3000
5. Subsections 69.2(2), 78(1) and 79(3) of The Labour Relations Act

DECISION RENDERED: July 29, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor was a probationary employee whose employment was terminated. The Union filed a grievance alleging a violation of article 2101, which prohibited the termination of an employee without just cause.

The Employer cited section 79(3) of The Labour Relations Act which allowed for the exclusion of a probationary employee from the just cause provision. In addition, the Employer responded that, as per article 3102, probationary employees could be discharged without notice and without recourse to the grievance procedure. Therefore, it did not acknowledge the grievance. The Union retorted that the situations outlined in the two articles were different. Article 3102 dealt specifically with terminations due to staff redundancy, while article 2101 dealt with disciplinary discharges. Restrictions outlined in article 3102 should not have been read into article 2101. Therefore, it argued that a distinction existed between "discharge" of an individual for disciplinary reasons and "termination." Because the Grievor was discharged, even though he was a probationary employee, he was entitled to grieve the dismissal.

AWARD: The grievance was found to be arbitrable. The Board was of the opinion that the intent of The Act was to include rather than exclude employees from the rights provided in the legislation, and to decide a grievance based upon the merits of the case, unfettered by procedural difficulties. It also found that the modern trend in arbitration favoured the avoidance of discharges without just cause.

DISSENT: G.D. Parkinson, Nominee for the Employer. Mr. Parkinson found fault with the Union's argument that discharge is distinct from termination, because, although all terminations are not discharges, all discharges are terminations. Because article 3102 clearly stated that a probationary employee could be terminated without notice and without recourse to the procedure, and because all discharges are considered to be terminations, the Employer had the right to terminate the Grievor without having to prove just cause before an arbitrator. Therefore, Mr. Parkinson would have dismissed the grievance.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-08-001

EMPLOYER: New Flyer Industries Limited

UNION: Canadian Association of Industrial, Mechanical, and Allied Workers, Local No. 3

ARBITRATOR: J.M. Chapman, Q.C.

APPEARANCES:
K. Lercher, for the Employer
S. Spratt, for the Union

ISSUES:
1. Discipline: Non-disciplinary Demotion 7:3546
2. Incompetence 7:3510
3. The Reasonableness of the Penalty 7:4300
4. Jurisdiction of the Arbitrator: Reinstatement and Substitution of Penalty 2:1470

DECISION RENDERED: August 2, 1988
(Supplementary Award - November 16, 1988)

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: When the Employer assumed ownership of the company, it laid off most of the employees, so that it could implement changes in the workplace. The Grievor, a Machine Operator, was recalled after fourteen months. From the time he was recalled, the Grievor made errors which had caused a loss of material, a loss of time and had a detrimental effect on the production schedule. During one shift, a brake machine, which the Grievor was operating, malfunctioned due to operator error. As a result of this incident, and the Grievor's previous errors, he was reclassified to an Assistant Production Worker, a position two levels below Machine Operator. The Union filed a grievance alleging that the demotion was disciplinary and unjust. It argued that the Employer should not have recalled the Grievor as an Machine Operator if it believed he was not qualified. As well, the Union lay blame on the Employer, because it had not properly trained the Grievor on the use of the brake machine, and because it ignored his requests for assistance.

The Employer explained that the Grievor had been demoted, because his actions created a safety hazard and had caused serious and costly errors. As well, it argued that the Grievor lacked the ability and knowledge to perform the job to the standards it expected.

AWARD: The grievance was allowed in part. Based upon the evidence, the Arbitrator found that the Employer had objectively assessed the Grievor's inability to perform the job in accordance with the standards imposed. He ruled that the Employer was justified in demoting the Grievor. However, he ruled that the Grievor should only have been demoted to the next lowest level. Therefore, he ordered that the Grievor was to be reclassified to Production Worker and to be reimbursed for the difference in the wage rates.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-08-002

EMPLOYER: Flin Flon General Hospital

UNION: Manitoba Food & Commercial Workers, Local 832

ARBITRATOR: C.B. Cramer, Q.C.

APPEARANCES: W. Jones, for the Employer
D. Primeau, for the Union

ISSUES:
1. Discipline: Warnings, Suspension 7:3542
2. Insubordination: Refusal to Follow Instructions 7:3610
3. Health and Safety 7:3621
4. Personal Appearance Regulations 7:3624
5. The Collective Agreement: Company Rules 4:1500

DECISION RENDERED: August 2, 1988

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Employer issued pants to its staff to be worn as part of their uniforms. At the time of the first distribution, the Grievor, a Housekeeping Aide, was on maternity leave, and was not issued her pants until she returned to work. The Grievor had a waist size of 26, but was issued pants with a 32 inch waist as this was the smallest size on hand. The Employer had the pants altered, although not sufficiently to satisfy the Grievor, who complained that they were too wide, too long, and too loose. Due to her dissatisfaction with the fit, she wore "non-conforming" pants, and altered the uniform in contravention of the Director's orders. Because she failed to conform with the dress policy and altered the uniform, the Grievor was suspended for three shifts. The Union filed a grievance alleging that the suspension was unjust. It contended that the Grievor acted in a reasonable way because she believed that tha pants compromised her safety. The Employer argued that they had proven insubordination, and that the dress code was a reasonable job requirement.

AWARD: The grievance was allowed in part. The Arbitrator found that this was not a "personal appearance" case, and that the principle of "obey now and grieve later" applied. As well, the Arbitrator found that, while the Grievor believed that the pants threatened her safety, her actions in extremely altering the pants and refusing to wear them were unwarranted. However, she found that the Grievor's complaint was justified and that the reaction of the Employer was too slow. Thus, she ordered the suspension be reduced from three shifts to one shift.

AUTHORITIES: Re Fireco Inc. & United Steelworkers, 29 L.A.C. (3d) 250; T.R.W. Seat Belt Division & Textile Workers Union, Local 1698, 32 L.A.C. (3d) 240.

FILE NO. AA88-08-003

EMPLOYER: Trails West Motor Hotel

UNION: Hotel and Restaurant Employees and Bartenders Union, Local 206

ARBITRATOR: F.M. Steel

APPEARANCES: H. Henning, for the Employer
E. Goralski/G. Whalen, for the Union

ISSUES:
1. Discipline: Theft 7:3310
2. Untrustworthiness and Conflict of Interest 7:3330
3. Burden of Proof 7:2300
4. Jurisdiction of the Arbitrator: Reinstatement and Substitution of Penalty 2:1470

DECISION RENDERED: August 3, 1988

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: On May 1, 1988, the Employer returned to active management of the hotel because of inventory shortages and lack of profits. A general meeting was held where all the employees were made aware of the rules and expectations of management, which included a discussion on "stealing". On May 27, 1988, the Employer discharged the Grievors, who were employed as a bartender and a bouncer. It alleged that, contrary to its rules, they were taking beer home on credit, were drinking at the hotel after hours, were not paying for beer they consumed, and were borrowing funds from the cash floats. The Union filed a grievance alleging that the dismissals were without just cause. The Grievors testified that the funds were borrowed with the knowledge and permission of the previous manager and the assistant manager, and that they had intended to repay the monies on payday.

AWARD: The grievance concerning the bartender was denied, while the grievance concerning the bouncer was allowed in part. The Arbitrator stated that the Employer could not discipline the Grievors for any infraction of the rules which occurred prior to May 1, 1988. Because the Employer could not prove, on the balance of probabilities, that the Grievors were guilty of the first three acts after May 1, the Arbitrator ruled that they could not be disciplined for those. However, she found that the Employer had established the misuse of the cash floats. With respect to the first grievance, the Arbitrator found that the Grievor was aware that funds were not for personal use and that any shortages were to be replaced within twenty-four hours. She ruled that his failure to report the shortage was a deliberate attempt to conceal his actions. Therefore, the Arbitrator ruled that his discharge was reasonable because his relationship with the Employer no longer carried a degree of trust and reliability. In contrast, the Arbitrator ruled that the discharge of the second Grievor was not justified. She stated that because the second Grievor was not responsible for the float, he was not in the same position of trust as the first Grievor. However, as of May 13, he was aware of the rules, and even though two or three paydays had past, he had not repaid the funds. Therefore, some discipline was warranted. Thus, the Arbitrator ordered that his discharge be substituted with a suspension for two and a half months without compensation and without an accumulation of seniority.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-08-004

EMPLOYER:	Nygard International Ltd.
UNION:	The International Ladies' Garment Workers Union, Local 288
ARBITRATOR:	M.H. Freedman, Q.C.
APPEARANCES:	H.G. Piercy, for the Employer D. Macri, for the Union
ISSUES:	1. Discipline: Warnings, Suspensions, Discharge 7:3542 2. Insufficient and/or Careless Work 7:3520 3. The Doctrine of Culminating Incident 7:4310 4. Subsection 121(3) of The Labour Relations Act
DECISION RENDERED:	August 3, 1988
EXPEDITED ARBITRATION:	No

CIRCUMSTANCES: The Grievor, who was a Cutter with eighteen months of seniority, made mistakes in cutting on a number of occasions. Each time, the Employer would show him the correct way to cut. He would improve for a short time, but after a week or two, his performance would deteriorate. When the Employer asked him to do work other than cutting, he refused. After a number of warnings and a two-day suspension, the Employer discharged the Grievor. The Union filed a grievance alleging that the penalty was too severe for an occasional quality problem.

The Employer argued that the poor quality of the Grievor's work caused problems for the other employees, who depended on the accuracy of the cutting process. Each time he made an error, the earning power of the other employees was affected, because they were on piecework. It contended that the penalty was not too severe, because it had imposed progressive discipline.

AWARD: The grievance was denied. The Arbitrator found that the Grievor was capable of performing the job to the established standards, because his performance improved after each warning. In consideration of the Grievor's short employment history, the number of times he was advised of his poor performance, the ripple effect caused by the poor quality of his work, and the expectation that his performance would not change if reinstated, the Arbitrator ruled that the discharge was justified.

AUTHORITIES: Edith Cavell Private Hospital and Hospital Employees' Union, Local 180, 6 L.A.C. (3d) 229 (at 233).

FILE NO. AA88-08-005

EMPLOYER: The Deer Lodge Centre Inc.

UNION: The Public Service Alliance of Canada

BOARD: J.M. Chapman, Q.C., Chairperson
D.H. Kells, Nominee for the Employer
J. McNevin, Nominee for the Union

APPEARANCES: G.D. Parkinson, for the Employer
G. Maruca, for the Union

ISSUES:
1. Seniority: Senior Employee with the Required Ability 6:3210
2. Trial, Training and Familiarization Periods 6:3230
3. Education and Experience 6:3320
4. Examinations and Tests 6:3340
5. Jurisdiction of the Arbitrator: Arbitrability: Time Limits 2:3128

DECISION RENDERED: August 5, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, who was a Supervisor in Housekeeping Services, applied for, but was denied, the position of Senior Supervisor. The successful applicant was not a member of the staff. The Union filed a grievance alleging that the Employer had violated article 30.03 of the collective agreement, which stipulated that job vacancies would be filled by the most senior applicant provided the employee possessed the necessary qualifications. It submitted that the Grievor was entitled to receive the position on the basis of his seniority, his qualifications, and his good employment record. Further, as per article 30.4, all promotions were subject to a ninety-day trial period. Thus, if the Grievor was unable to perform the job, he could be sent back to his previous position. In addition, the Union argued that the Employer's use of written and oral tests created a new challenge that was neither fair nor relevant, and the Employer was wrong in relying on the test results.

The Employer disputed that the Grievor possessed the necessary qualifications or the required five years of experience for the position. In addition, the Grievor did not do well on the test, even though he was given ample opportunity to review and improve his answers. As well, it argued that the intent of article 30.4 was not to automatically entitle an employee to a promotion on a ninety-day trial. Rather, the intention of the article was to protect an employee from losing his original position.

AWARD: The grievance was denied. The Board found that the test was fair, reasonable and relevant, because the same test was given to all applicants, and the Grievor was given the opportunity to review and correct his answers. It was satisfied that the Union failed to demonstrate that the Grievor had the necessary experience and qualifications to perform the basic requirements of the position. As well, the Board ruled that the article 30.4 did not entitle the Grievor to a ninety-day trial period. Therefore, it ruled that the Employer did not violate the seniority clause of the collective agreement.

DISSENT: J. McNevin, Nominee for the Union. Mr. McNevin was of the opinion that by relying on the test results, the Employer did not base its decision on a realistic evaluation. As well, he felt that the requirement for five years of experience was an artificial barrier. Based on these reasons, he would have found in favour of the Grievor. However, because of the inordinately long period between the original grievance and the award, a decision in favour of the Grievor would be prejudicial to the incumbent. Therefore, Mr. McNevin would have ordered the Employer to grant the next open position to the Grievor for a ninety-day trial period.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-08-006

EMPLOYER:	Motor Coach Industries Limited
UNION:	International Association of Machinists and Aerospace Workers, Lodge 1953
ARBITRATOR:	G.C. MacLean, Q.C.
APPEARANCES:	J. Scurfield, for the Employer L. Paulson, for the Union
ISSUES:	1. Seniority: Lay-off 6:2200 2. Promotion and Lay-off Procedures 6:2300 3. The Collective Agreement: Amendments 4:1300 4. Applications of Estoppel 2:2220
DECISION RENDERED:	August 5, 1988
EXPEDITED ARBITRATION:	No

CIRCUMSTANCES: As a result of a reduction of the workforce, there was a general reorganization of the remaining employees according to seniority and qualifications. After the move, the Grievors found that their new duties were too difficult for them to perform. The Production Manager told them to take a voluntary lay-off. Both Grievors signed a statement which stated that they had requested the lay-off. The Union filed a grievance on behalf of the Grievors and a policy grievance, which alleged that the Employer violated article 21 of the collective agreement, which required that the least senior employees be laid off first.

The Employer agreed that the lay-offs had not be done according to seniority. However, it submitted that the collective agreement allowed for the termination of staff unable to perform an assigned job. It was of the opinion that a voluntary lay-off was preferable to forcing an employee to perform a job which was beyond his capabilities, thereby risking termination. As well, it explained that the Union had agreed to allow voluntary lay-offs on a one time experimental basis.

AWARD: The grievances were allowed in part. The Arbitrator could not find that an agreement existed, because the terms were not sufficiently defined, and the agreement was not in written form. He found that the Employer was premature in implementing the lay-offs, due to the absence of a clear and definite agreement. However, he ruled that the Grievors were estopped from claiming any monetary relief, because the Union led the Employer to believe that it was prepared to accept the scheme, and because the Grievors had signed the statements without duress.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-08-007

EMPLOYER: The Seine River School Division No. 14

UNION: The Seine River Teachers' Association No. 14 of The Manitoba Teachers' Society

BOARD: J.M. Chapman, Q.C., Chairperson
D.K. Kells, Nominee for the Employer
J. London, Q.C., Nominee for the Union

APPEARANCES: R. Simpson, for the Employer
M. Myers, Q.C., for the Union

ISSUES:
1. Compensation: Qualifying for Medical and Disability Benefits 8:3320
2. The Collective Agreement: Intention of the Parties 4:2100
3. Subsection 34.1 of The Employment Standards Act

DECISION RENDERED: August 8, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, who was a teacher, gave birth to her child prior to the commencement date of her maternity leave. She requested sick leave for the eight working days which occurred prior to the starting date of her leave. Instead, the Employer advanced the maternity leave to the date of confinement without the Grievor's consent. The Union filed a grievance alleging that the Employer violated the sick leave provisions of the collective agreement, because it denied the request for sick leave and it unilaterally accelerated the commencement of the maternity leave. The Union submitted that as per the collective agreement, any condition that disabled an individual was to be treated as a sickness, and entitle her to sick leave benefits.

The Employer argued that the normal pregnancy, normal delivery and normal recovery of the Grievor did not constitute a sickness. It contended that because the collective agreement provided two separate schemes for sickness and maternity leave, the condition of the Grievor did not entitle her to sick leave benefits. In addition, it noted that as per subsection 34.1(1) of The Employment Standards Act, maternity leave benefits could commence earlier than the anticipated date. Therefore, it was entitled to advance the commencement date.

AWARD: The grievance was allowed in part. The Board ruled that the collective agreement and The Employment Standards Act did not grant the Employer the right to unilaterally accelerate the maternity leave. In addition, even though arbitral and judicial jurisprudence have not considered pregnancy to be an illness, the Board ruled that the Grievor was entitled to sick leave benefits. It found that, although the pregnancy was normal, the Grievor required an episiotomy, which is a surgical procedure. As a result of the surgery, the Grievor was confined to bedrest for four working days. The Board stated that if an individual is confined to bed as a result of surgery, regardless of why the surgery was necessitated, that was a clear and inescapable indication of being sick. Therefore, it ordered the Employer to grant the Grievor four days sick leave. It denied the request for the four days when the Grievor was no longer bedridden, as she could not be considered ill.

DISSENT: D.H. Kells, Nominee for the Employer. Mr. Kells could not find any evidence that the episiotomy, a routine preventative procedure, extended the period of convalescence. In his view, the majority's interpretation of the word "sick" did not accord with the ordinary and plain meaning of that term. He stated that if the parties intended that sick days could be used for the period during which an employee was hospitalized, then that would have been provided for in the collective agreement. In addition, he was of the opinion that the Employer had the right to unilaterally advance the start of the leave. Alternatively, he would have found that the Grievor could have been granted an unpaid leave of absence, but not sick leave. Therefore, he would have dismissed the grievance.

AUTHORITIES: Numerous Authorities were cited in the award.

FILE NO. AA88-08-008

EMPLOYER: Westfair Foods Limited

UNION: Manitoba Food and Commercial Workers, Local 832

ARBITRATOR: G. Reid

APPEARANCES: R. Roy, for the Employer
R. Ziegler, for the Union

ISSUES:
1. Jurisdiction of the Arbitrator: Limits to the Arbitration of Grievances: Time Limits 2:3128
2. The Arbitration Process: Notice to Parties Affected 3:1210
3. Admissibility of Evidence: Extrinsic Evidence 3:4400
4. Seniority: Promotion, Demotion, Transfer 6:2100
5. Ability and Qualifications Criteria 6:3300
6. Subsection 109(2)(e) of The Labour Relations Act

DECISION RENDERED: August 10, 1988

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Grievor, who was employed as a part-time clerk in the fish department, requested a transfer when his hours were eliminated as a result of a reduction in the workload. His request was denied. After four months had elapsed without the Grievor receiving any hours of work, his employment was terminated as per section 19.21 of the collective agreement. The Union filed a grievance alleging that the Employer improperly denied the Grievor's request for a transfer.

At the outset of the hearing, the Employer argued that the grievance was inarbitrable because the time limits for filing the grievance had expired. It contended that the Grievor should have filed when he was informed that his transfer was denied. It also argued that the hearing should not proceed, because, as it was unaware who would be affected by a potential bumping caused by the Grievor's transfer, that individual could not be notified of his right to appear at the hearing. As to the transfer itself, the Employer argued that the Grievor had not met the test of "demonstrated ability and experience to perform the job", as stated in article 19.19. However, the Union asserted that his prior experience in the fish department and with a previous employer had provided the Grievor with the appropriate experience. During the discussion of article 19.19, the Union objected to the admissibility of the testimony of one of the Employer's witnesses relating to the negotiations leading to the collective agreement. It contended that because the written agreement was not ambiguous, the extrinsic evidence was inadmissible.

AWARD: The grievance was denied. Due to the lack of clear communications regarding the grievance and as allowed in The Labour Relations Act, the Arbitrator granted relief against time limits. He ruled that the hearing should not be impeded by the unreasonable requirement to notify any unknown parties. He stated that any employee who would suffer as a consequence of the decision could take the matter to arbitration. With regards to the use of extrinsic evidence, the Arbitrator was of the opinion that it should be admissible only under the unusual circumstance where both the agreement was ambiguous and the evidence was devoted to revealing the existence of a pre-existing consensus of opinion. He ruled that the test was not met, and therefore, the extrinsic evidence should be excluded.

The Arbitrator found that the word "demonstrated", as it was used in article 19.19, restricted the application to those situations where at least one manager had observed an employee perform the appropriate functions. The Arbitrator ruled that the Union had not established that the Grievor had demonstrated his abilities to a manager, or that the job requirements were inappropriate.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-08-009

EMPLOYER: Winnipeg Free Press

UNION: Media Union of Manitoba, Local M-38

ARBITRATOR: P.W. Schulman, Q.C.

APPEARANCES: G.D. Parkinson, for the Employer
D. Macri, for the Union

ISSUES:
1. Seniority: Senior Employee with the required Ability 6:3210
2. Ability and Qualifications Criteria 6:3300
3. Organization and Direction of the Workplace: Vacancy 5:2510
4. Job Posting 5:2520

DECISION RENDERED: August 15, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, who was a Clerk 1, applied for, but was denied, the position of Acting A.C.D. Supervisor. The successful candidate was junior to the Grievor. The Employer acknowledged that the Grievor had all the qualifications for the job, except for good interpersonal skills. The Union filed a grievance alleging that the Employer violated article 46 of the collective agreement which stipulated that the most senior employee would be entitled to vacant positions. It argued that the requirement for interpersonal skills was not listed on the job posting as required by article 9 of the collective agreement. Therefore, the Grievor could not have known the importance of that skill. The Union also claimed that the interview process was unfair, because during the short interview, the Employer did not relay its concerns regarding the Grievor's lack of interpersonal skills.

The Employer contended that article 46 did not apply in this case, because a vacancy did not exist as the incumbent was on sick leave and was entitled to the job on her return.

AWARD: The grievance was allowed. The Arbitrator was satisfied from the facts that the Employer had made an irrevocable declaration that a vacancy existed. He also found that interpersonal skills were an essential requirement for the job, and therefore, reference of the requirement should have appeared on the posting. As well, he found that the interview process was not fair, because the Employer did not inform the Grievor of its concerns. As a result, the Arbitrator ruled that the job posting and the interview process were technically deficient. However, the Arbitrator limited the relief to a declaration of the breach, because the Grievor, from her previous employment experience, must have known of the requirement for interpersonal skills, and because the Employer concluded that the Grievor was not qualified, she would not have been the successful candidate even if she was informed of the qualifications.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-08-010

EMPLOYER:	New Flyer Industries Limited
UNION:	The Canadian Association of Industrial, Mechanical,and Allied Workers, Local 3
ARBITRATOR:	J.M. Chapman, Q.C.
APPEARANCES:	K. Lercher, for the Employer S. Spratt, for the Union
ISSUES:	1. Seniority: Bumping 6:2330 2. Trial, Training and Familiarization Periods 6:3230 3. Examinations and Tests 6:3340
DECISION RENDERED:	August 16, 1988
EXPEDITED ARBITRATION:	No

CIRCUMSTANCES: In order to protect his employment, the Grievor, an Assistant Production Worker, made a request to "bump" down into the position of Warehouseman. Because he had never worked as a Warehouseman before, he was informed that he would be given the opportunity to test for the position. He was told the test requirements a week prior to taking the test. As well, he was given two hours to familiarize himself with the operation of equipment and procedures relevant to the position. During the test, he did not demonstrate that he could safely operate a forklift, and he had an accuracy rate of 50% on filling stock orders. As a result, he failed the test and was laid off. The Union filed a grievance alleging that the Employer violated the seniority provisions of the collective agreement because it denied the Grievor of his bumping rights. It submitted that the test was not fair as the Grievor did not have a sufficient familiarization period, and was not given the safety manuals for the equipment. Further, it argued that safety was not an issue, because the Grievor refused to be tested on equipment with which he was unfamiliar proving that he was concerned with safety.

The Employer contended that the test was reasonable, fair and relevant, because the Grievor was aware of the contents of the test, which had been approved by Union representatives; because Union representatives were present when the test was administered; and because the Union representatives did not challenge the Employer's evaluation of the test results. In addition, the test had been made easier to accommodate the Grievor, and was not given until he confirmed that he was ready.

AWARD: The grievance was denied. The Arbitrator could not find evidence that seniority rights were disregarded. As well, he found that the Grievor did not demonstrate that he was capable of performing the job. He ruled that the Employer was not required to train the Grievor as he had to be capable of the job he wanted to bump into. Therefore, he ruled that the testing procedures were fair and that the Employer did not violate the collective agreement.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-08-011

EMPLOYER: Golden Door Geriatric Centre

UNION: The Manitoba Government Employees' Association

BOARD: D.G. Baizley, Chairperson
G. Mitchell, for the Employer
C. Derham, for the Union

APPEARANCES: G.D. Parkinson, for the Employer
R. Tonn, for the Union

ISSUES:
1. Seniority: Promotion, Demotion and Transfer 6:2100
2. Trial, Training and Familiarization Periods 6:3230
3. Discipline: The Reasonableness of the Penalty 7:4300
4. Reinstatement and Compensation 7:6000

DECISION RENDERED: August 25, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievors had been dismissed for reasons not specified in the award. Although the Board found that the dismissals were justified, it ordered that, due to mitigating factors, the Grievors were to be reinstated with no compensation. The Employer assigned the Grievors to the day shift rather than re-assigning them to the night shift. The Union alleged that the assignment to the day shift amounted to further discipline and that the failure to re-assign the Grievors to the night shift was a breach of the collective agreement. The Employer argued that the assignment to the day shift was necessary, because the Grievors required a period of supervision and retraining with respect to the basic procedures of patient care.

AWARD: The grievance was denied. The Board found that the temporary assignment to the day shift for the purpose of retraining and greater supervision was not disciplinary. As well, it found that the collective agreement had not been breached, because article 11.02 permitted the temporary transfer of an employee where good and sufficient operational requirements warranted the transfer. Therefore, the Board ruled that the re-assignment to the day shift was proper.

AUTHORITIES: None cited.

FILE NO. AA88-08-012

EMPLOYER: Domtar Inc.

UNION: Retail, Wholesale and Department Store Union, Local 71

ARBITRATOR: D.E. Bowman, Q.C.

APPEARANCES: R.L. Theodoru, for the Employer
R. Tonn, for the Union

ISSUES:
1. Compensation: Computation of Vacation and Vacation Pay 8:3230
2. Seniority: Non-working Periods 6:1110
3. The Collective Agreement: The Object of Construction: 4:2100
4. Jurisdiction of the Arbitrator: Estoppel 2:2200

DECISION RENDERED: August 25, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, who had been employed for nine years, was informed by the Employer that he was entitled to three weeks of vacation. The Union filed a grievance alleging violation of article 12 of the collective agreement, which provided for four weeks of vacation with pay after "nine years continuous service." The Employer argued that the Grievor was not entitled to the increase, because his seniority date had been adjusted in accordance with article 13 which allowed for the cessation of the accumulation of seniority after 15 weeks on lay-off. The Union contended that articles 12 and 13 dealt with separate and distinct subject matters. If the intent of the parties had been to limit vacation entitlement, as was the case with seniority, then that requirement would have been expressed in article 12. Conversely, the Employer stated that the two articles were to be read together. If the intention was not clear from the agreement, then an ambiguity existed sufficient to invoke evidence of past practice. As well, it submitted that the Union was estopped from enforcing its interpretation of vacation rights until the next round of negotiations, because it failed to complain of this practice in the past.

AWARD: The grievance was allowed. The Arbitrator found that past practice was not consistent or clear to justify the Employer's claim. As well, the Arbitrator found that the Union was not estopped, because he could not find evidence that the Union concurred with the adjustment of the vacation entitlement to follow the seniority adjustments. With respect to the interpretation of the articles, he could not find that the clause in article 13, which dealt with the cessation of seniority during a lay-off, could be attached to article 12. If the parties intended vacation entitlement to be based on the same formula, a similar limitation could have been contained in that article. Therefore, he ruled that the Grievor was entitled to four weeks' vacation and ordered the Employer to compensate him for one week's vacation.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-08-013

EMPLOYER: The City of Brandon

UNION: The Amalgamated Transit Union, Division 1505

ARBITRATOR: M.H. Freedman, Q.C.

APPEARANCES: R.W. Singleton, for the Employer
D. Macri, for the Union

ISSUES: 1. Compensation: Wage Guarantees 8:1200
2. The Collective Agreement: The Object of Construction 4:2100

DECISION RENDERED: August 29, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: A dispute arose between the parties relating to the proper interpretation of article 2001 of the collective agreement, which stipulated that Spareboard Drivers were guaranteed a minimum wage of 7 1/2 hours per day or 75 hours per ten-day pay period. The Union contended that the drivers were entitled to the daily guarantee. Therefore, if they worked 75 hours in nine days, they would be entitled to an extra 7 1/2 hours for the tenth day, even if they did not work on that day. On the other hand, the Employer argued that the drivers were guaranteed 7 1/2 hours per day to a maximum of 75 hours in a pay period.

AWARD: The grievance was allowed. The Arbitrator stated that both parties were wrong when they asserted that only one guarantee was in effect. However, he found that article 2001 and its companion letter of understanding were unclear. In his view, the letter of understanding made reference to the daily guarantee "and" the 75 hour guarantee. Therefore, he ruled that the Employer was not justified in ignoring the daily guarantee. Thus, he found in favour of the Union's interpretation.

AUTHORITIES: None cited.

FILE NO. AA88-09-001

EMPLOYER: The City of Winnipeg

UNION: Canadian Union of Public Employees, Local 500

ARBITRATOR: W.D. Hamilton

APPEARANCES: M.S. Samphir/M.E. Cavett,for the Employer
R. Tonn, for the Union

ISSUES:
1. Discipline: Discharge 7:3542
2. Insufficient and/or Careless Work 7:3520
3. Unsuitability 7:3530
4. Probationary Employees: Standard of Review of Disciplinary Action 7:5020
5. The Collective Agreement: Management Rights 4:2310

DECISION RENDERED: September 6, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, who was a probationary employee, was employed as a Utility Labourer in the Traffic Services Branch. His supervisors alleged that he was unsafe in traffic, because he would walk across the street without checking for on-coming traffic. In addition, one of his supervisors complained that he needed constant supervision and instruction. Based upon the complaints, the Grievor was discharged for being unsuitable to work in traffic. The Union filed a grievance alleging that the Employer violated article 14-1 of the collective agreement, because it had terminated the Grievor in an arbitrary manner. It argued that the Employer's investigation into the complaints was arbitrary, because it did not get input from all supervisors, and it did not give the Grievor an opportunity to respond to complaints regarding his performance.

The Employer asserted that a decision could not be characterized as arbitrary when, as admitted by the Union, it was made in good faith. As well, it argued that its decision was not hasty as the Grievor had received verbal warnings about his conduct in traffic. It also suggested that the type of investigation desired by the Union was more relevant to a non-probationary employee.

AWARD: The grievance was denied. The Arbitrator found that the collective agreement gave the Employer the "sole discretion" to conduct a largely subjective evaluation of a probationer before permitting him to assume regular status. As well, he commented that the Arbitrator must extend the broadest latitude to the Employer in its decision making and must recognize the limited scope of arbitral review. He ruled that the decision was not arbitrary, because the Grievor was evaluated by standards accepted by the Union, the decision was based on the observations of experienced personnel, and the Grievor did receive cautionary notices. Further, he ruled that the nature and extent of the investigation satisfied the requirements of the collective agreement, and that the Union failed to meet the onus to prove arbitrariness.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-09-002

EMPLOYER: The St. Boniface General Hospital

UNION: Manitoba Paramedical Association,
Manitoba Association of Health Care
Professionals

ARBITRATOR: M.H. Freedman, Q.C.

APPEARANCES: M. Werier, for the Employer
P. Teskey, for the Union

ISSUES:
1. Seniority: Promotion, Demotion and Transfer 6:2100
2. Senior Employee with the Required Ability 6:3210
3. Trial, Training and Familiarization Periods 6:3230
4. Ability and Qualifications Criteria 6:3300

DECISION RENDERED: September 7, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, who was a Technologist I in the Bio-Chemistry Lab, applied for a lateral transfer into the Immunology Lab. Her application was denied, and an employee substantially junior to her was the successful candidate. The Union filed a grievance alleging that the seniority provisions of the collective agreement were violated. The Employer acknowledged that the Grievor had met all the standards for the position, except for the requirement to have two months of recent experience as a graduate technologist in immunology. The Union argued that the requirement was unreasonable, because a technologist with a general Registered Technician certification should be qualified to work in any of the laboratories. As well, it submitted that the Employer was requiring immediate capability which was contrary to Article 705 of the collective agreement, which allowed for a transfer to be subject to a three-month trial period.

The Employer argued that because the Immunology Lab had few employees, there was no one available to train a new employee. As well, it explained that as the Employer, it had the right to set qualifications for a position. Finally, it stated that article 705 had to be read in conjunction with article 704 which stipulated that the most senior employee would be granted a position provided that he had the necessary qualifications. Therefore, in this case, Article 705 was not an issue.

AWARD: The grievance was allowed. The Arbitrator found that the Employer did not act in bad faith when it established the requirement for two months' experience. However, he could not find that the requirement was a "necessary" qualification, as the technologists already employed in the Immunology Lab did not have that experience when they were hired. As well, he noted that the requirement excluded highly skilled senior employees from lateral transfers, because it would be impossible for them to bump into a laboratory without the "necessary" experience. As a result, the lay-off and recall rights in the collective agreement would become meaningless. Therefore, the Arbitrator ordered that the Grievor be awarded the position subject to a three-month trial period.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-09-003

EMPLOYER: Westfair Foods Ltd.

UNION: Manitoba Food and Commercial Workers, Local 832

BOARD: P.S. Teskey, Chairperson
W.D. Hamilton, Nominee for the Employer
A. Coulter, Nominee for the Union

APPEARANCES: G. Mitchell/J. Hedley, for the Employer
R. Tonn/D. Kohuch, for the Union

ISSUES:
1. Compensation: Entitlement to Wages 8:1000
2. Seniority: Trial, Training and Familiarization Period 6:3230
3. Organization and Direction of the Workplace: Employee Defined 5:1122

DECISION RENDERED: September 7,1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: Prior to the spring of 1987, the Employer compensated people for time spent training and considered them to be employees from the date the training commenced. As of April 1987, the Employer offered "free training" to create a ready labour force in anticipation of a pending strike. The individuals were not paid for the training and were not considered to be employees until they were actually hired for a specific job. The Union filed two grievances alleging that the Employer violated the collective agreement because the participants in the "free training" program were being trained to perform or were performing bargaining unit work, were not being paid, and were not covered by the collective agreement. It argued that the demonstrated history between the parties indicated that training and instruction had been considered as "work" for which payment was made. As well, the only substantial difference in the training programs was the lack of pay. Further, it submitted that the trainees were "productive" from the first day of training, because they represented a potential benefit to the Employer.

The Employer contended that it was not obligated under the collective agreement to pay for training, and those who accepted the training did so knowing that they would not be paid. It considered the program to be an educational one, because the offer was made to the community in general and the skills taught were portable. In addition, it argued that no work was lost by any members of the bargaining unit as a result of the program. The Union replied that the understanding by an individual was not critical as the parties to the collective agreement were itself and the Employer, and the Employer was forbidden to bargain with individuals. As well, it argued that the Employer devised a form of "non-paid employment" and was not training individuals to be "job ready" in the world at large, but for employment within its own stores.

AWARD: The grievances were allowed. With respect to the training given before the strike, the Board found that, although the free training was designed to create a pool of "potential" employees rather than providing an educational experience, a "nexus" between the training and an immediate job was absent. Therefore, it ruled that those individuals who took the "free training" and who were never hired could not be considered employees and were not entitled to any pay. However, it ruled that those trainees who were subsequently hired were employees. With respect to the cashiers trained after the strike, the Board found that a connection between the training and a specific immediate need was present to such a degree that employment was virtually certain. Thus, the Board declared that an employee, who took the free training either before or after the strike, and who was retained in a bargaining unit job, was to be treated as an employee from the date that training commenced.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-09-004

EMPLOYER: Westfair Foods Ltd.

UNION: Manitoba Food and Commercial Workers, Local 832

ARBITRATOR: P.S. Teskey

APPEARANCES: R.C. Roy, for the Employer
R. Ziegler, for the Union

ISSUES:
1. Organization and Direction of the Workplace: Distribution of Work Within the Bargaining Unit 5:2000
2. Express Prohibitions in the Agreement 5:2200
3. The Arbitration Process: Extrinsic Evidence 3:4400

DECISION RENDERED: September 9, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The grievance arose from a disagreement as to whether Meat Production Assistants were allowed to operate the pork chop cutting machine. As stated in a letter of understanding signed by the parties, one of the duties was listed as "dust removal (pork chop cutter);." The Union argued that the use of parentheses around the words "porkchop cutter" and the absence of a comma between those words and "dust removal" had to indicate that the actual duty allowed was the cleaning of dust from the cutter and that the parentheses were used to clarify the previous wording. As well, because the same wording appeared in three separate documents, then the parties were bound by the wording. On the other hand, the Employer argued that the Union's interpretation was technical and extreme, and the acceptance would result in absurdities because there was no "dust" produced by the cutter and that dust removal could then only be performed in relation to that created by the cutter and no other machine. It contended that the Union was simply taking advantage of a typographical error.

AWARD: The grievance was denied. The Arbitrator found that the agreement was poorly drafted. However, he stated that the acceptance of the Union's interpretation would result in the absurdities stated by the Employer. As well, if the Union's interpretation was accepted, then the phrase would have no meaning as there was no such duty. He also found that, based on extrinsic evidence, that the Employer's interpretation was more consistent with the general intent of the use of departmental assistants.

AUTHORITIES: Brown & Beatty, Canadian Labour Arbitration (second edition), pp. 152-155.

FILE NO. AA88-09-005

EMPLOYER:	The University of Manitoba
UNION:	The Canadian Association of Industrial, Mechanical and Allied Workers, Local 9
ARBITRATOR:	M.H. Freedman, Q.C.
APPEARANCES:	P.C. Suché, for the Employer S.G. Soronow, for the Union
ISSUES:	1. Discipline: Suspension 7:3542 2. Fighting, Assault 7:3430 3. Procedural Requirements and the Power to Discipline 7:2100 4. Estoppel 2:2200 5. Section 121 of The Labour Relations Act
DECISION RENDERED:	September 16, 1988 (Related Award - November 21, 1988)
EXPEDITED ARBITRATION:	No

CIRCUMSTANCES: The Grievor, who was accused of sexual harassment, was suspended for 59 days without pay. The Union filed a grievance alleging that the Employer violated article 23 of the collective agreement, because it had failed to issue a letter of warning. In addition, it argued that the suspension, as per the collective agreement should have been limited to three days.

The Employer contended that the Union was estopped, because it claimed that during the bargaining process, the Union had agreed that the warning provisions of article 23 did not have to be strictly complied with in all circumstances. Further, it argued that in this case, strict compliance would be ludicrous due to the severity of the Grievor's actions. In response, the Union stated that the right to the letter was a substantive and not a procedural matter, because a whole step was omitted rather than a breach of procedure.

AWARD: The grievance was allowed. The Arbitrator found that the evidence was insufficient to find that an agreement existed that did not require the parties to comply with the warning provision. As well, as per section 121 of The Labour Relations Act, and as per article 23, he ruled that he did not have the jurisdiction to relieve the Employer from noncompliance with the provision. Because the rights granted were substantive, he ruled that the collective agreement was breached, and therefore, the suspension was improperly imposed. Therefore, he ordered that the suspension be set aside.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-09-006

EMPLOYER: Carnation Foods Company Ltd.

UNION: The United Food and Commercial Workers International Union, Local 111

ARBITRATOR: W.D. Hamilton

APPEARANCES: G. Mitchell/J. Palamar, for the Employer
R. Tonn, for the Union

ISSUES:
1. Discipline: Suspension 7:3542
2. Insufficient and/or Careless Work 7:3520
3. The Reasonableness of the Penalty 7:4300
4. Jurisdiction of the Arbitrator: Reinstatement and Substitution of Penalty 2:1470

DECISION RENDERED: September 19, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: Two of the Grievors were suspended for 36 hours for loafing on the job, while the third was suspended for 72 hours for sleeping on the job. The Union filed grievances alleging that the suspensions were unjust. It argued that in the case of the third grievance, the Grievor was not sleeping. With respect to all three grievances, the Union argued that, although the breaks were unauthorized, the Grievors were following a long standing practice where, having completed all specifically assigned tasks, they could take a "break." It also stated that the discipline was too harsh in consideration of the Grievors' long service and good employment records.

The Employer maintained that the proper discipline was imposed in all cases, because the Grievors had taken all paid and authorized breaks on their shift, and decided on their own not to work. It pointed out that, in view of the Grievors' admission that work was available, they were asserting "a right to loaf."

AWARD: The grievances were allowed in part. The Arbitrator found on the balance of probabilities that the third Grievor was loafing, and not sleeping on the job. In addition, he found that the breaks taken were not compensatory for authorized breaks missed in the past. Therefore, because the Grievors were loafing and because work was available, their conduct was worthy of discipline. However, due to their unblemished and lengthy service, he ruled that the penalty imposed was too harsh and reduced the suspensions to a twelve hour shift, or one day, without pay.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-09-007

EMPLOYER: INCO Metals Company

UNION: The United Steel Workers of America, Local 6166

ARBITRATOR: J.M. Chapman, Q.C.

APPEARANCES: M. Christiansen, for the Employer
D. Brown, for the Union

ISSUES:
1. Seniority: Senior Employee with the Required Ability 6:3210
2. Promotion, Demotion and Transfer 6:2100
3. The Promotion and Lay-off Procedures 6:2300
4. Disicpline: Personal Activities Detrimental to Production 7:3570
5. The Collective Agreement: Management's Duty to Act Fairly 4:2320

DECISION RENDERED: September 20, 1988

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: In December 1987, the Grievor, who was a Thickener Operator, successfully bid into the position of Furnace Operator Helper, which was two classifications higher. At that time, a committee was evaluating the wages of various positions. The Grievor, who preferred to be a Thickener Operator, hoped that that position would be re-evaluated and would receive higher pay. During the next three months, while waiting for the committee's decision, the Grievor bid for the two positions on an alternating basis. Because he was the most senior applicant, the Employer was required under the seniority provisions of the collective agreement to offer him the positions. The Employer considered the Grievor's actions to be detrimental to the effective operations of the company, because the positions could not be filled permanently, forcing supervisors to devote a large amount of their time to administrative rather than supervisory duties. Therefore, even though he was the most senior applicant, the Employer denied the Grievor the position, and awarded it to a more junior applicant. The Union filed a grievance alleging that the Employer had violated the seniority provisions of the collective agreement. It argued that the Employer, in effect, was unilaterally altering terms of the collective agreements, because it was imposing a limit on the number of times an employee could successfully bid for a position.

AWARD: The grievance was denied. The Arbitrator found that the Grievor's actions were unreasonable. The collective agreement stipulated that seniority would be a determining factor only if the requirements and efficiency of operations were not effected. In his opinion, the Employer had simply ended a situation which, if allowed to continue, would have allowed the Grievor to bid and rebid into the two positions in perpetuity without either being filled. Because the Employer did not bar the Grievor from bidding for future vacancies, just this one, the Arbitrator ruled that it did not violate the collective agreement.

AUTHORITIES: Re Toronto Board of Education and Teachers' Federation, 3 L.A.C. 3rd, 336.

FILE NO. AA88-09-008

EMPLOYER: The University of Manitoba

UNION: The Association of Employees Supporting Education Services

ARBITRATOR: M.H. Freedman, Q.C.

APPEARANCES: W. Hamilton, for the Employer
R. Tonn, for the Union

ISSUES:
1. Organization and Direction of the Workplace: Assignment of Bargaining Unit Work to Non-unit Employees 5:1400
2. Managers 5:1127
3. The Collective Agreement: The Object of Construction 4:2100
4. Management Rights 4:2310

DECISION RENDERED: September 22, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, who was a Supervisor in the Food Services Department, claimed that she should have worked the evening of June 12, 1987. Instead, the Manager of Special Functions, who was not a member of the bargaining unit, attended and supervised the function. The Union filed a grievance alleging that article 2.3 of the collective agreement had been violated, because the circumstances which would allow non-bargaining unit employees to perform bargaining unit duties did not apply in this case. It asserted that once a decision was made that supervision would be required at an event, then it must be provided by a member of the unit.

The Employer argued that article 2.3 was not applicable and that the job of supervising special functions was not proprietary. In addition, it claimed that, as stated in the supervisor's job description, the job was not to cater to special evening functions, but to only do so " as required." As well, catering a function was different from providing supervision. It added that management had the discretion to decide if and who would provide supervision at an event.

AWARD: The grievance was denied. The Arbitrator concluded that article 2.3 did not prevent the Employer from having the manager supervise the function in question. He found that the phrase "as required" did not mean that a member of the unit had the right to work every time the Employer determined supervision would be necessary. As well, he found that the supervisory duties performed that evening were incidental to the manager's regular duties and that his performance of those duties did not reduce the Grievor's regular hours of work. Therefore, the Employer was not required to call in the Grievor.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-09-009

EMPLOYER: The Deer Lodge Centre Inc.

UNION: The Public Service Alliance of Canada

BOARD: J.M. Chapman, Q.C., Chairperson
R.B. McNicol, Nominee for the Employer
L. Kaye, Nominee for the Union

APPEARANCES: G.D. Parkinson, for the Employer
C. Rogers, for the Union

ISSUES:
1. Compensation: Equal Pay for Equal Work 8:1100
2. Organization and Direction of the Workplace: Revision of Classification and Rates 5:2440
3. Criteria: Equal Work or Equal Skill 5:2420
4. Section 6 of The Pay Equity Act

DECISION RENDERED: September 29, 1988

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The parties had agreed to review the question of pay equity between the positions of Nursing Aide I (Aide) and Nursing Aide II (Orderly). When they were unable to resolve the issue, they submitted the matter to arbitration. The Union stated that the positions were, in substance, the same, with only very slight differences which were negligible. In addition, it argued that the composition of the two groups, on a gender basis, proved that there was discrimination based upon gender. Therefore, because the concept of pay equity related to discrimination between the sexes, the matter fell under the provisions of The Pay Equity Act. In contrast, the Employer argued that The Act was not applicable in this case, because no presumption could be drawn from the composition of the two groups. It submitted that the Board was to make a finding of fact as to whether or not the work was of equal value, and not to deal with the overall question of pay equity. Further, it argued that the duties of the two positions, as shown in the job descriptions, were different, and that the Aides were prohibited from performing certain duties of the Orderlies.

AWARD: The grievance was allowed. The Board found that there was a substantial degree of correlation between the job descriptions of the two positions, and that the positions were closely related. However, it was not prepared to conclude that the differential in the pay rates was based on gender discrimination. Therefore, the matter was not being adjudicated under the provisions of The Act, but on the "actual" job. The Board did base its decision on criteria outlined in the act to determine the degree of equality between the positions. The Board ruled that an Orderly required and utilized a somewhat larger degree of skill than the Aide. However, it could not find that any more effort was required in the performance of the work by either position, or that an Orderly had more responsibility than an Aide. Therefore, the Board concluded and ruled that the working conditions and the effort expended by both Aides and Orderlies were equal. As well, it ruled that the functions carried out solely by the Orderlies did not constitute a significant portion of their work time. Therefore, the Board held that the two classifications should be paid the same rate.

DISSENT: R.B. McNicol, Nominee for the Employer. Reasons were not submitted.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-10-001

EMPLOYER: The City of Winnipeg

UNION: Canadian Union of Public Employees, Local 500

ARBITRATOR: M.H. Freedman, Q.C.

APPEARANCES: M. Samphir/M.E. Cavett, for the Employer
R. Tonn, for the Union

ISSUES:
1. Organization and Direction of the Workplace: Standard of Proof 5:2430
2. Changes in Job Function 5:2410
3. Revision of Classification and Rates 5:2440

DECISION RENDERED: October 3, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, classified as a Storekeeper 2, worked at one site for a majority of the time. However, the Grievor worked two hours a day, including transportation time, at a bulk fuel facility. At the fuel depot, the Grievor worked alone, doing clerical work and making mechanical inspections. The Grievor argued that he was performing Storekeeper 3 functions while at the bulk fuel depot and demanded a wage adjustment for the time spent at the facility. Under the collective agreement, only a Storekeeper 3 may administer a bulk gasoline facility. The job description for a Storekeeper 3 required the person to be responsible for "store merchandise, inventory control and supervision of Storekeeper 1 or 2 personnel."

The Employer argued that the Grievor was still performing Storekeeper 2 functions while at the fuel depot and that he was not ultimately responsible for the facility. It was emphasized by the Employer that the Grievor did the same work at the fuel depot that he performed at his other place of work. Given the Grievor's limited role at the gasoline depot, the Employer held that he could not be said to administer the facility. As well, it was noted that the Grievor did not have any supervisory duties as he was the sole worker at the site.

AWARD: The grievance was denied. The Arbitrator found that the Union did not meet its onus to prove that the Grievor should be classified as a Storekeeper 3. Using the "central core" test, it was determined that the majority of the Grievor's responsibilities at the fuel depot were not compatible with those of a Storekeeper 3. In the Arbitrator's view, the Grievor's duties at the fuel facility were not "materially [or] qualitatively different from his regular responsibilities."

AUTHORITIES: Palmer, Collective Agreement Arbitration in Canada (2nd. ed.), p. 475-476.

FILE NO. AA88-10-002

EMPLOYER: The Province of Manitoba

UNION: Manitoba Government Employees' Association

ARBITRATOR: M.H. Freedman, Q.C.

APPEARANCES: R. Cram, for the Employer
L. Morrisseau/P. Williamson, for the Union

ISSUES: 1. Compensation: Overtime 8:2100
2. Entitlement to Wages 8:1000

DECISION RENDERED: October 7, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievors were workers at the Bannock Point work camp. Traditionally, the Grievors worked a shift lasting from Friday morning until Monday evening. However, due to a long weekend, they were forced to work until Tuesday morning. The Grievors claimed that, as per article 3:04 of the collective agreement, they were entitled to time and one half wages for the overtime worked. When their claim was denied, the Union filed a grievance alleging that the Employer violated the collective agreement. It argued that article 3:04 was sufficiently clear. It also submitted that overtime rates had been paid in a similar situations.

The Employer stated that as per article 8:01(b) of the collective agreement, which provided that employees in correctional camps would receive a flat amount payment "in lieu of daily overtime", the Grievors' did not qualify for regular overtime rates.

AWARD: The grievance was denied. The Arbitrator held that the language of article 8:01(b) was clear and unequivocal on the matter. As the Grievors were workers at a correctional camp, they were entitled to the flat rate only. The Arbitrator refused to base a finding on evidence of past practice, noting that there was insufficient and conflicting evidence.

AUTHORITIES: None cited.

FILE NO. AA88-10-003

EMPLOYER: Selkirk and District General Hospital

UNION: Manitoba Organization of Nurses' Association

BOARD: S.G. Sigurdson, Q.C., Chairperson
R.A. Simpson, Nominee for the Employer
D. Shrom, Nominee for the Union

APPEARANCES: G. Parkinson, for the Employer
R. Deeley, for the Union

ISSUES:
1. Compensation: Educational and Experiential Increments 8:2330
2. Subsection 121(2) of The Labour Relations Act

DECISION RENDERED: October 9, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor was employed as an emergency/intensive care nurse. While employed, the Grievor obtained a Bachelor of Arts degree, majoring in sociology with a minor in psychology. Appendix B of the collective agreement provided for an educational allowance to be paid for advanced clinical training diplomas or for a B.A. if "relevant" to a nursing position. The Grievor's application for the pay increase was rejected. As a result, the Union filed a grievance alleging that the Grievor was improperly denied the educational allowance. It argued that, because the Bachelor of Arts degree was included in Appendix B as being eligible for the educational allowance, then courses taken which directly applied to nursing should be seen to make the degree relevant.

The Employer contended that the Grievor could not establish a direct link between the academic knowledge acquired in the advanced courses and his work experiences. It argued that the introductory level sociology and psychology courses required in nursing school provided sufficient instruction and that his degree was of no utility to the hospital. Finally, it was suggested that the degree had no application to the work done by the Grievor as none of the courses had a clinical component.

AWARD: The grievance was allowed. The Board found that the courses taken by the Grievor were both a benefit and relevant to the nursing duties performed. While it acknowledged that not all B.A. degrees would qualify for the allowance, the Board was satisfied that an evidentiary link existed between the Grievor's area of study and his position in the hospital.

DISSENT: Robert Simpson, Nominee for the Employer. Mr. Simpson felt that the degree earned by the Grievor did not provide the "necessary significance, directness or regularity of occurrence to meet the test of relevancy as set forth in the collective agreement." He submitted that all R.N.'s would have acquired the same knowledge through their basic training and that the benefits of the Grievor's degree could not be applied directly or frequently to his position in the hospital.

AUTHORITIES: None cited.

FILE NO. AA88-10-004

EMPLOYER: Rural Municipality of Brokenhead

UNION: International Union of Operating Engineers, Local 901

ARBITRATOR: J. Atwell

APPEARANCES: Not stated

ISSUES:
1. Discipline: Essential Ingredients 7:3612
2. Refusal to Follow Instructions 7:3610
3. Employment Record 7:4428
4. Discharge 7:3542:
5. Jurisdiction of the Arbitrator: Reinstatement and Substitution of Penalty 2:1470

DECISION RENDERED: October 17, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, an employee with 12 years of seniority, was responsible for the distribution of gravel in the municipality. A ratepayer requested that a load of gravel be dumped on his driveway. Not having the authority to take such actions on his own, the Grievor asked a counsellor if he should provide the gravel. According to the Grievor, the counsellor was sympathetic to the request and the gravel was provided. The Employer claimed that no approval was given and that the Grievor was told to wait until the request was checked out. When the Employer learned that the gravel had been delivered, the Grievor was dismissed for insubordination. The Grievor disputed this claim and grieved unjust dismissal by the Employer.

AWARD: The grievance was allowed in part. The Arbitrator accepted the Employer's version of the events that transpired and ruled that the Grievor had disobeyed a clear order. However, the Arbitrator found that the penalty imposed by the Employer was excessive. It was noted that the Grievor had been a long time employee with a perfect employment record. No disciplinary action had ever been taken against him and he was not given a chance to explain his version of the situation before he was dismissed. Given this, the Arbitrator ordered that the Grievor be suspended for one week and reinstated with seniority.

AUTHORITIES: None cited.

FILE NO. AA88-10-005

EMPLOYER: The Province of Manitoba

UNION: Manitoba Government Employees' Association

BOARD: M.H. Freedman Q.C., Chairperson
R. Whiteway, Nominee for the Employer
L. Cherniak, Nominee for the Union

APPEARANCES: R. Cann, for the Employer
G. Rodgers, for the Union

ISSUES:
1. Organization and Direction of the Workplace: Changes in Job Function 5:2410
2. Compliance with Wage Structure 5:2400
3. Criteria: Equal Work or Equal Skill 5:2420
4. Management Rights 4:2310

DECISION RENDERED: October 21, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, classified as a Technical Engineering Officer 1 (T.E. 1), was employed by the Department of Highways in District I. Due to an increase in workload, the Grievor was asked to assume responsibility for the western half of the district, the eastern half belonging to a T.E. 2. Although recommended for a promotion to a T.E. 2 level, the Grievor was denied the reclassification. Eventually, the Civil Service Commission ruled that, given his responsibilities in the western part of the region, the Grievor should properly be classified as a T.E. 2. However, the Department of Highways refused to allow two T.E. 2 employees to be posted in the same district. Given this, the Commission reassigned the Grievor's duties to reflect those of a T.E. 1. Nevertheless, as a result of illness to the T.E. 2 in the District, the Grievor served as acting T.E. 2 in his absence and was compensated accordingly.

When the T.E. 2 returned from sick leave the Grievor's wages were reduced to a T.E. 1 level. After this, the Grievor's supervisory duties over other personnel were reduced and some projects were taken away from him. Finally, the Grievor was transferred to another position.

The Union contended that for a substantial period of time the Grievor was paid less than his duties entitled him to be paid, as he was performing the work of a T.E. 2. The Union submitted that the reassignment of the Grievor's duties was in effect a demotion which was non-disciplinary, in bad faith and designed solely to circumvent the result of the reclassification process. It was argued that no real reassignment of duties took place until the Grievor was transferred. Finally, the Union complained that the unilaterally determined quota allowing only one T.E. 2 per district was arbitrary and unjustified.

The Employer stated that it acted in good faith throughout the entire process. Further, the decision to allow only one T.E. 2 to a District was defended as a sound business decision that management was entitled to make.

AWARD: The grievance was allowed. The Board found that the Grievor continued to perform work of a T.E. 2 after his acting T.E. 2 status was revoked. With the exception of the removal of his supervisory duties, the Grievor consistently fulfilled the function of the higher classification.

AUTHORITIES: None cited.

FILE NO. AA88-10-006

EMPLOYER: The Province of Manitoba

UNION: Manitoba Government Employees' Association

ARBITRATOR: M.H. Freedman, Q.C.

APPEARANCES: E.W. Olson, Q.C., for the Employer
R. Tonn, for the Union

ISSUES:
1. Discipline: Off-Duty Behavior 7:3010
2. Disciplinary Demotion 7:3544
3. The Reasonableness of the Penalty 7:4300
4. Jurisdiction of the Arbitrator: Reinstatement and Substitution of Penalty 2:1470

DECISION RENDERED: October 21, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, who was a Sheriff in The Pas, became aware of the identities of several people involved in a brutal murder which had occurred several years earlier. Although he told the informant to go to the police, he never communicated any of his findings to the proper authorities. When the Grievor's actions became known to the public, the Employer demoted the Grievor. The Union contended that the Grievor was off duty at the time of the incident and had no responsibility to report his findings. Further, it was suggested that the Employer did not adequately convey expectations of off-duty conduct to the Grievor. As well, the Union argued that if discipline was warranted, the penalty imposed was too severe, as the Grievor had an otherwise perfect employment record.

The Employer argued that, as an officer of the court, the Grievor had a responsibility to conduct himself in a manner beyond reproach at all times. In failing to reveal the information that he had learned, it was said that the Grievor failed to discharge his duty and had brought justice into disrepute.

AWARD: The grievance was allowed in part. The Arbitrator held that the Grievor's actions embarrassed the Employer and brought justice into disrepute throughout the province. As such, discipline was warranted. However, the Arbitrator noted that disciplinary demotion could be employed only when incompetence was proven. In this case, the Grievor had shown himself to be a competent worker for an extended period. Therefore, the Arbitrator order the demotion to be substituted with a 21 day suspension.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-10-007

EMPLOYER: Manitoba Pool Elevators

UNION: Grain Service Union

BOARD: D.E. Bowman, Q.C., Chairperson
E.W. Olson, Q.C., Nominee for the Employer
L. Sperling, Nominee for the Union

APPEARANCES: H. Wagner, for the Employer
G.D. Parkinson, for the Union

ISSUES:
1. Jurisdiction of the Arbitrator: Estoppel 2:2200
2. Compensation: Fringe Benefits (mileage allowance) 8:3000

DECISION RENDERED: October 24, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: As per the collective agreement, a mileage allowance was paid to all Elevator Managers' Assistants who were required to travel beyond a specified distance to work. From the date of the agreement, however, persons classified as Assistant Elevator Managers and Elevator Managers also received the allowance. Due to a restraint program, the Employer alerted the Employees that all persons not classified as Elevator Managers' Assistant would no longer be eligible for the travel allowance.

The Union claimed that the Employer should be estopped from withdrawing the mileage allowance to other employees. It was argued that for over six years, people in another job classification were treated as though they were synonymous to those in the Elevator Managers' Assistant category. Given this, the Union contended that the consensual conduct of the parties had established a right to the travel allowance for employees in the other classification by virtue of a common interpretation of the collective agreement.

The Employer held that estoppel can only serve as a shield, not a sword. In this instance, it was argued that the Union was trying to gain new rights, not merely preserving existing ones. It was said that the agreement was clear on the matter, as only Elevator Managers' Assistants were eligible for the allowance. Further, the Employer stated that it was not bound for having extended a gratuitous benefit outside the scope of the collective agreement.

AWARD: The grievance was denied. The Board found that, although estoppel could be applied to the Grievor's situation, the he had not detrimentally altered his position as a result of the representation made by the Employer. In making its decision, the Board emphasized that it sought to narrow the application of estoppel to cases where there was clear evidence "that the claiming party has altered its position injuriously in reliance upon the continuation of those benefits as promised, expressed or implied."

DISSENT: L. Sperling, Nominee for the Union. Ms. Sperling argued that the Grievor had relied on the Employer's practice. Had the Union been given notice of the Employer's intention to withhold payment of the allowance, it would have taken appropriate steps through collective bargaining. Thus, Ms. Sperling would have upheld the grievance.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-10-008

EMPLOYER:	Bristol Aerospace Ltd.
UNION:	Canadian Association of Industrial, Mechanical and Allied Workers, Local 5
BOARD:	P.S. Teskey, Chairperson P. Fussey, Nominee for the Employer N. Richards, Nominee for the Employer P. Halayko, Nominee for the Union R. Meisner, Nominee for the Union
APPEARANCES:	Not Stated
ISSUES:	1. Organization and Direction of the Workplace: Compliance with the Wage Structure 5:2400 2. Changes In Job Function 5:2410 3. Revision of Classification and Rates 5:2440
DECISION RENDERED:	October 25, 1988
EXPEDITED ARBITRATION:	No

CIRCUMSTANCES: The Grievor, classified as a category 22 "Welder-Inert Gas", claimed that he was doing the work of a higher classification and sought reclassification. The Grievor worked for the Employer for ten years. According to all accounts, the Grievor was one of the fastest and most competent workers in the entire plant. While on the job, the Grievor had become qualified to work under many conditions associated with a higher classification. As well, it was noted that he often did work normally assigned to higher classifications. The Employer argued that the Grievor was not qualified to perform all work required of the higher classification.

AWARD: The grievance was allowed. In making its decision, the Board emphasized that it received little assistance from the job descriptions provided by the Employer, which were not specific and incomplete. As a result, its decision was based largely on consideration of personal and work performance criteria. The Board noted that a substantial and regular portion of the Grievor's work involved jobs with a higher rating than his status indicated. Given the confidence of his superiors in his skill and his superior qualifications, the grievance was allowed.

DISSENT: P. Fussey/N. Richards, Nominees for the Employer. Reasons were not submitted.

AUTHORITIES: None cited.

FILE NO. AA88-10-009

EMPLOYER: Brandon University

UNION: Brandon University Faculty Association

ARBITRATOR: J.P. Janzen

APPEARANCES: J. Combs, for the Employer
R. Tonn, for the Union

ISSUES:
1. Organization and Direction of the Workplace: Compliance with Wage Structure 5:2400
2. Revision of Classification and Rates 5:2440
3. Temporary, Casual and Part-Time Employees 5:1124
4. The Collective Agreement: Management Rights 4:2310

DECISION RENDERED: October 26, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: In 1986, the Grievor was offered a one year term position as an Assistant Professor, step 6. While employed, he accepted another term position, filling in for a different professor on sabbatical leave. He was hired for the position but only classified as an Assistant Professor, step 1. Concerned over the substantial difference in salary, the Grievor sought reclassification.

It was the position of the Union that, while the Employer was free to hire the Grievor at any classification, Appendix F of the collective agreement required that he not be hired at a level lower than he held at the time of the job offer. Because the Grievor was employed at the time of the offer, it was said that he was a "member" within the contemplation of the collective agreement and, as such, entitled to a pay increase.

The Employer argued that Appendix F dealt only with the timing of classification adjustments, not with entitlement to such changes. The Employer contended that the hiring of the Grievor to another term position did not constitute a reappointment. Finally, the Employer submitted that no proprietary right to wage benefits was established for term employees under the collective agreement.

AWARD: The grievance was denied. The Arbitrator found that, as the collective agreement did not create any proprietary right to subsequent term positions, it also did not grant any classification benefits to interim professors accepting different term appointments. The

Arbitrator held that the Grievor was in the same position as any other applicant at the end of his term appointment and could be hired for another position at whatever level the Employer desired. In coming to this decision, the Arbitrator stated that if there was to be a creation of a proprietary right to a benefit associated with a job, absent the creation of a proprietary right to the underlying job itself, it had to be explicitly stated in the collective agreement.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-10-010

EMPLOYER: Health Sciences Centre

UNION: Manitoba Association of Health Care Professionals

ARBITRATOR: S.G. Sigurdson, Q.C.

APPEARANCES: W.S. Gardner, for the Employer
P.S. Teskey, for the Union

ISSUES:
1. Organization and Direction of the Workplace: Revision of Classification and Rates 5:2440
2. Changes in Job Function 5:2410

DECISION RENDERED: October 28, 1988

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Grievor, who was classified as an EEG Technologist II, claimed that she was performing the work of a higher classification and sought reclassification. The majority of the Grievor's work involved preparing epileptic patients for neurosurgical treatment of epilepsy. Prior to 1985, only a limited amount of treatment was done at the Health Sciences Centre because patients were sent to Ontario for the actual surgery. Since 1988, however, the procedures had been performed in Winnipeg and the preparations had become much more involved. As a result, the Grievor's workload increased substantially. As well, the Grievor said that she supervised certain tests and priorized EEG appointments. The Grievor also emphasized that she was involved in the teaching of nursing staff, students and residents.

In light of this expansion of duties, the Union claimed that the Grievor met the requirements of the Technologist III classification. The collective agreement provided that a Tech III "is responsible for the technical operation of an EEG laboratory, directing technical activities, supervising and assisting with the development of training activities." While arguing that the Grievor qualified under this definition, the Union also suggested that Article 320 required that a remedy be provided if duties in a job have substantially changed.

AWARD: The grievance was denied. In reaching a decision, a two fold test was employed, the first step relating to work performance, and the second test to responsibility assumed. The Arbitrator admitted that the Grievor was performing work of a greater responsibility than that of the Tech II classification. However, it was found that the Grievor did not perform the "central core" of the higher classification's duties. While the Arbitrator acknowledged that the Grievor assisted with training activities, he found that she did not "direct" or "supervise" within the contemplation of the job description. It was determined that her responsibility extended only to the recording room, not the entire EEG lab. As well, it was noted that the Grievor managed only herself and that the Tech IV had ultimate responsibility for the entire operation. The Arbitrator rejected the Union's position on Article 320. He said that a finding of substantial change in job performance provided no assurance of reclassification. It was said that a grievor must not only prove that the duties of the job have changed, but it must be established that they have been altered so radically that they fell within the definition of a higher classification.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration, (2nd ed.) at p. 238.

FILE NO. AA88-10-011

EMPLOYER: INCO Ltd.

UNION: United Steelworkers of America, Local 6166

ARBITRATOR: C.B. Cramer, Q.C.

APPEARANCES: J. Christianson, for the Employer
B. McFee/D. Brown, for the Union

ISSUES:
1. Discipline: Discharge 7:3542
2. Insufficient and/or Careless Work 7:3520
3. Rehabilitative Potential 7:4422
4. Mitigating Factors 7:4400
5. Jurisdiction of the Arbitrator: Reinstatement and Substitution of Penalty 2:1470

DECISION RENDERED: October 31, 1988

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Grievor, a worker at the Employer's refinery, claimed that he was discharged without just cause. According to the Employer, the Grievor was fired after he threw a bar at another employee, hitting him in the leg. This incident, which was one of many examples of insubordinate or careless behavior, was described as the "culminating incident" which led to the Grievor's dismissal. Prior to this, the Grievor had been warned repeatedly about his behaviour and was at the final step of the disciplinary process.

AWARD: The grievance was allowed in part. In making her decision, the Arbitrator emphasized that the behaviour of the Grievor was such that a dismissal would normally be justified. However, the Employer's discipline and counselling program failed to address the needs and personal problems of the Grievor. He received mixed signals from the Employer, being reinstated on one occasion when he was told any further problems would result in his dismissal. As well, the Employer's counselling program did not perform as it should have in the Grievor's situation. In reducing the Grievor's penalty, the Arbitrator took into account his long, and mostly satisfactory, work record and stated that she did not believe his rehabilitative potential had been exhausted. A four-month suspension and rehabilitation counselling program was ordered.

AUTHORITIES: None cited.

FILE NO. AA88-11-001

EMPLOYER: Manitoba Telephone System

UNION: Communication and Electrical Workers of Canada

BOARD: D.E. Bowman, Q.C., Chairperson
G.D. Parkinson, Nominee for the Employer
P. Moist, Nominee for the Union

APPEARANCES: J. McGuire, for the Employer
M. Myers, Q.C., for the Union

ISSUES:
1. Seniority: Promotion, Demotion and Transfer 6:2100
2. Senior Employee with the Required Ability 6:3210
3. Ability and Qualifications Criteria 6:3300

DECISION RENDERED: November 2, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor was an unsuccessful candidate for a vacant position as a Stock Analyzer. Despite being the most senior qualified applicant and having received above average scores from the selection committee, the Grievor was not offered one of the open positions. The Union filed a grievance claiming that the Grievor was unjustly denied a promotion which should have been granted to her on the basis of seniority. It argued that the selection process was biased and failed to meet the requirements of Article 18.08 of the collective agreement which provided that, when hiring, the Employer would consider, "seniority qualifications, ability, service requirements and acceptable performance. Seniority should be given every consideration ... and shall be the governing factor in the case of equally rated applicants." The Union submitted that the final selection process was overly subjective, with too much emphasis placed on the interview while performance evaluations were ignored. The Union criticized the lack of equal weighting given to the factors mentioned in Article 18.08.

The Employer held that, through its two stage test which employed different criteria to narrow the field and select the successful candidates from the short list of applicants, it met the requirements of Article 18.08. It was the position of the Employer that the two stages of the selection process could not be divorced from each other and, in fact, constituted an indivisible whole which had the effect of considering all of the factors included in Article 18.08. The Employer contended that there was no bias in the process as the two most highly rated candidates were granted the promotions.

AWARD: The grievance was denied. In reaching its decision, the Board acknowledged the shortcomings of the application screening procedures. The Board found, however, that the Employer had made an honest effort to devise a selection process which took into account the factors listed in Article 18.08. It could not find any decision which would require that seniority be accorded equal weight with other factors. Because of the significant difference between the Grievor's and the successful candidates' scores, the seniority of the Grievor did not matter.

DISSENT: P. Moist, Nominee for the Union. Mr. Moist was critical of the lack of weight given to some of the factors by the committee in the final selection stage. He emphasized that the testimony revealed that members of the selection committee were unsure of the meanings of some of the terms in Article 18.08. The final selection process was flawed because the selection of the successful candidates was based solely on the last half of the two stage process. In the dissentor's opinion, the collective agreement required all factors to be considered at all stages with equal weight being given to each item.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-11-002

EMPLOYER:	The Province of Manitoba
UNION:	Manitoba Government Employees' Association
ARBITRATOR:	J.M. Chapman, Q.C.
APPEARANCES:	A. Rumak, for the Employer L. Morrisseau, for the Union
ISSUES:	1. Discipline: Suspension 7:3542 2. Insufficient and/or Careless Work 7:3520 3. Failure to Co-operate 7:3580 4. Insolent, Unco-operative Behaviour, Obscene Language 7:3660
DECISION RENDERED:	November 3, 1988
EXPEDITED ARBITRATION:	Yes

CIRCUMSTANCES: The Grievor was a seasonal worker with the Department of Natural Resources. A five day suspension was imposed on him for failing to perform required duties and for physical abuse of a co-worker. Specifically, he was accused of verbally and physically tormenting a fellow worker on the job site. With regard to the other allegation, the Grievor was accused of remaining in a truck while his fellow employees performed their duties.

The Grievor apologized for the damage caused to a co-worker's clothing in one of the incidents. However, he could not recall any of the specifics of the alleged incidents. Moreover, he contended that the acts in question were merely examples of horseplay which were a normal occurrence on the job. As for the other charge, the Grievor claimed that he had to stay with the truck for safety's sake, because of brake problems with the vehicle.

AWARD: The grievance was allowed in part. The Arbitrator found that the Employer could not satisfy its onus of proving that the Grievor did not have a good reason for remaining in the truck which, at the time, was parked on an incline. However, the Arbitrator agreed that the incidents of physical and verbal abuse were more than mere horseplay and merited some form of punishment. As the suspension was based on the occurrence of two incidents, the suspension was reduced to three days.

AUTHORITIES: None cited.

FILE NO. AA88-11-003

EMPLOYER: Bristol Aerospace Ltd.

UNION: Canadian Aerospace Workers, Local 5
Canadian Association of Industrial, Mechanical and Allied Workers

BOARD: P. Teskey, Chairperson
P. Fussey, Nominee for the Employer
N. Richards, Nominee for the Employer
P. Halayko, Nominee for the Union
R. Meisner, Nominee for the Union

APPEARANCES: Not Stated

ISSUES:
1. Organization and Direction of the Workplace: Distribution of Work Within the Bargaining Unit 5:2000
2. Compliance with the Wage Structure 5:2400
3. Revision of Classification and Rates 5:2440

DECISION RENDERED: November 4, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, who was a welder, claimed that he was regularly performing the work of a higher level and sought reclassification. While the Grievor was classified as a category 22 welder, he performed a variety of duties, some listed as belonging to a higher classification. The job classification schedule provided in the collective agreement was vague and incomplete, with the Grievor's duties not falling within the definitions provided.

The Union cited a past decision by the Board where a reclassification was ordered for an employee in the same firm and situation as the Grievor. The Union argued that the combination of elements in the Grievor's job entitled him to the higher classification. As well, the Union suggested that the Grievor was being punished for having accepted the Employer's request to take on some lower classified work. This, the Union said, prevented him from regularly performing the higher classified work that he would otherwise have undertaken.

The Employer contended that the Grievor was mainly working on duties of a lower classification. While the Employer acknowledged that the Grievor did perform some of the higher classified work, it was said that this rarely occurred.

AWARD: The grievance was denied. In rejecting the Union's claim that the Grievor was being punished for having accepted work of a lower classification, the Board found that the Employer never guaranteed any of the more advanced work to the Grievor. The Board ruled that the grievance must fail as the evidence revealed that the majority of work performed by the Grievor did not belong to the higher classification.

AUTHORITIES: None cited.

FILE NO. AA88-11-004

EMPLOYER: The City of Winnipeg

UNION: International Association of Machinists
and Aerospace Workers, Local 2589

BOARD: J.M. Chapman, Q.C., Chairperson
G.D. Parkinson, for the Employer
M. MacIsaac, for the Union

APPEARANCES: Mr. Samphir, for the Employer
Mr. Paulson, for the Union

ISSUE: 1. Interest Arbitration 1:0000

DECISION RENDERED: November 4, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The parties requested clarification of an award previously issued by the Board. As a result of the Board's ruling, the Employer was required to pay less to employees for court time. The award provided that, where not otherwise specified, the provisions in the agreement were to be in full force and effective from January 1, 1986. The Employer claimed it was entitled to receive repayment of moneys paid out in excess of the Arbitration Award decision. The Employer argued that it would be patently unfair to require the pay out all benefits retroactively while not letting it take advantage of amendments which were in its favour.

The Union argued that the Board had not intended that the Court Time Payment would be retroactive. It noted that the Employer never requested that this aspect of the collective agreement be retroactive. Finally, the Union said that the Employer should not profit from a negative retroactive benefit.

AWARD: The grievance was denied. The Board ruled that the Court Time Payment Award was retroactive and the Employer was entitled to collect overpayments from its employees. In making its decision, the Board said that a retroactive reading should be disallowed only if its effect would be absurd or impractical. It found that no such result occurred in this case. The provisions of the award were clear to both parties, who were bound by all of its terms.

DISSENT: M. MacIsaac, Nominee for the Union. Mr. MacIsaac stated that the Board order did not represent any form of repayment. He also argued that the Board was never asked to deal with the repayment issue at any time during its initial hearings on the matter. Given this, he would have refused the Employer's claim for retroactive Court Time Payments.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-11-005

EMPLOYER:	Winnipeg School Division No. 1
UNION:	Canadian Union of Public Employees, Local 110
BOARD:	P.W. Schulman, Q.C., Chairperson E.W. Olson, Q.C., Nominee for the Employer R. Olien, Nominee for the Union
APPEARANCES:	G. Parkinson/K. Lercher, for the Employer R. Tonn/L. Diamond, for the Union
ISSUES:	1. Organization and Direction of the Workplace: Criteria: Equal Work or Equal Skill 5:2420 2. Vacancies 5:2510 3. Seniority: Job Posting 6:2310 4. The Collective Agreement: Management Rights 4:2310
DECISION RENDERED:	November 8, 1988
EXPEDITED ARBITRATION:	No

CIRCUMSTANCES: The Grievor, an Assistant Chief Caretaker, claimed that the Employer had improperly awarded a position to another person. The Grievor, who enjoyed more seniority than the successful candidate, claimed that the vacant Assistant Chief Caretaker position at Elmwood High was filled without being posted. The successful candidate was previously employed as an Assistant Chief Caretaker at Aberdeen School. The successful candidate filled in for the original Assistant Chief Caretaker at Elmwood during a leave of absence and subsequently assumed the position when he retired. As well, the permanent relocation of the successful candidate became necessary because Aberdeen School was reclassified, eliminating the successful candidate's position there.

The Union argued that the terms of the collective agreement were clear. The Employer was required to post notice of all vacancies so that all employees might bid on the position. It was the Union's position that the retirement of the original Assistant Chief Caretaker and the reclassification of Aberdeen School triggered the posting requirement.

The Employer contended that no vacancies occurred as the result of the various staff changes. It was said that no Assistant Chief Caretaker owned the location of his assignment and it was suggested that the Employer had the right to transfer an employee to any school in the division. The Employer cited a decision by the Manitoba Court of Appeal which ruled that, absent a specific provision in the collective agreement, location does not form part of a position.

AWARD: The grievance was denied. The Board held that no location was assigned to the Assistant Chief Caretaker position. It was said that the events in question did not create a vacancy within the contemplation of the collective agreement. In so ruling, the Board noted that, after the retirement of the original Assistant Chief Caretaker and the reclassification of the other school, there remained a full complement of Assistant Chief Caretakers, supporting the Employer's contention that no vacancy resulted.

DISSENT: R. Olien, Nominee for the Union. Reasons were not submitted.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-11-006

EMPLOYER: Bristol Aerospace Ltd.

UNION: Canadian Aerospace Workers, Local 5
Canadian Association of Industrial, Mechanical and Allied Workers

BOARD: P.S. Teskey, Chairperson
P. Fussey, Nominee for the Employer
N. Richards, Nominee for the Employer
P. Halayko, Nominee for the Union
R. Meisner, Nominee for the Union

APPEARANCES: Not Stated

ISSUES:
1. Organization and Direction of the Workplace: Changes in Job Function 5:2410
2. Compliance with the Wage Structure 5:2400
3. Revision of Classification and Rates 5:2440
4. Seniority: Aptitude 6:3330
5. Jurisdiction of the Arbitrator: Prior Award 2:3220

DECISION RENDERED: November 8, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, who was a Welder-Inert Gas for 16 years, sought reclassification. He claimed that he was regularly performing the duties of the higher classification of Welder-General. Evidence produced at the hearing revealed that the Grievor possessed a number of qualifications beyond what was required for his classification at the time. The Grievor had a similar grievance denied by this Board in 1986.

AWARD: The grievance was allowed. The Board found that the circumstances of the Grievor had changed substantially since his previous grievance. In so ruling, the Board emphasized that no one factor was determinative in its decision. The definitions and specific provisions in the collective agreement, performance, and seniority all played a role in the Board's decision. Given the variety of work performed by the Grievor and his aptitude at his duties, it held that the Grievor was entitled to the higher classification.

DISSENT: P. Fussey, Nominee for the Employer. Reasons were not submitted.

AUTHORITIES: None cited.

FILE NO. AA88-11-007

EMPLOYER: New Flyer Industries Ltd.

UNION: Canadian Association of Industrial, Mechanical and Allied Workers, Local 3

ARBITRATOR: J.M. Chapman, Q.C.

APPEARANCES: K. Lercher, for the Employer
S. Spratt, for the Union

ISSUES:
1. Jurisdiction of the Arbitrator: Damages 2:1410
2. The Arbitration Process: Statutory Authority 3:4100
3. Making the Award 3:5200

DECISION RENDERED: November 16, 1988
(Interim Award - August 2, 1988)

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: In an Interim Award dated August 2, 1988, the Arbitrator ruled that a two step demotion of the Grievor to the position of Assistant Production Worker was excessive and ordered that the Grievor be raised one step to the classification of Production Worker. The Arbitrator said in his decision that the Grievor should be demoted two steps only if he "cannot adequately perform the duties of a Production Worker." Prior to the original decision, however, the Grievor, who was then classified as an Assistant Production Worker, attempted to bump up to the Production Worker position to avoid a lay-off. He was required to perform a test to determine if he was technically qualified for the position. The Grievor failed this test. Both parties knew of this evidence during the original hearing before the Arbitrator. However, the Arbitrator had no knowledge of this fact at that time. In making his Supplementary Award, the question emerged of whether the Arbitrator was entitled to consider evidence of the Grievor's failure of the test.

The Union contested the Arbitrator's jurisdiction to consider evidence relating to matters not presented at the original hearing. It was said that the rules of evidence must prevail and the original Award must stand on its own and could not be amended. The Union argued that no test would have been required if the Grievor had only been demoted one step, as the original Award specified.

It was the position of the Employer that it would be patently unfair to force the Employer to pay the Grievor a higher wage than he was qualified to earn. The Employer noted that the original decision by the Arbitrator provided for a two step demotion if the Grievor was unable to meet the technical qualifications of the Production Worker position. As this was the case, it was suggested that the Grievor was never entitled to the higher classified position.

AWARD: The original award was altered. The Grievor was entitled to be paid at the higher classification only from the time of the original demotion to the date of the failed examination. In making his decision, the Arbitrator noted that he was not bound by the strict rules of evidence. After examining arbitral and judicial decisions, the Arbitrator held that it would be inappropriate to disregard unchallenged facts within the knowledge of both parties at the time of the original hearing.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-11-008

EMPLOYER: Westfair Foods Ltd.

UNION: Manitoba Food & Commercial Workers, Local 832

ARBITRATOR: G.C. MacLean, Q.C.

APPEARANCES: G. Mitchell/J. Palamar, for the Employer
R. Ziegler, for the Union

ISSUES:
1. Discipline: Notification of Absence 7:3110
2. The Nature of Disciplinary Sanctions 7:4210
3 Compensation: Illness: Benefits and other Rights 8:3300

DECISION RENDERED: November 18, 1988

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Grievor, a meat cutter, claimed that he was unjustly reprimanded and denied sick pay benefits. The grievance arose over the Grievor's alleged illness on March 12, 1988. The Grievor, who was scheduled to work the 12:00 a.m. to 8:00 a.m. shift, claimed that he became sick immediately prior to leaving for work. He delayed phoning his supervisor until his shift had started because he knew no one would be present in his department until that time. After trying unsuccessfully to contact someone he waited for the Employer to call him. This, the Grievor suggested, was the normal practice in the store. When his supervisor called, the Grievor said that he would come to work. However, while preparing to do so, he said that he still felt sick and decided not to go to work after all. Again, the Grievor attempted to contact someone at the meat cutting department but was unable to do so. Subsequently, the Employer told the Grievor that the matter might be reconsidered if a medical certificate was provided. Long after the incident, the Grievor contacted his doctor and received a medical certificate stating that he was absent from work due to illness.

The Employer maintained that the issue did not centre on whether or not the Grievor was ill. According to the Employer, the Grievor was reprimanded for failing to inform his supervisor that he would be unable to come to work. Under Article 1.05 of the collective agreement, sick pay was to be given only when an employee gave prompt notice regarding his absence to his supervisor. With regard to the medical certificate, the Employer said that it was of no value as it was obtained long after the Grievor had recovered.

AWARD: The grievance was denied. The Arbitrator found that the Grievor failed to inform the Employer of his illness, contrary to the provisions of Article 1.05 of the collective agreement, thereby disentitling him to sick pay. In making his decision, the Arbitrator characterized the Grievor's attempts at contacting his Employer as half-hearted and ineffective. The Arbitrator noted that there were other departments in the store that the Grievor could have contacted and asked to relay the message. Further, the Grievor had an opportunity to inform someone that he was sick when the store called early in the morning. However, when this occurred, the Grievor said that he would be coming in to work. Finally, the Arbitrator ruled that the evidential value of the Grievor's medical certificate was negligible as it was given long after the Grievor's illness and without an examination by the physician.

AUTHORITIES: None cited.

FILE NO. AA88-11-009

EMPLOYER: The University of Manitoba

UNION: Canadian Association of Industrial, Mechanical, and Allied Workers, Local 9

ARBITRATOR: J.M. Chapman, Q.C.

APPEARANCES: C. Suche, for the Employer
S. Soronow, for the Union
A. Dobrowolski, for the Grievor

ISSUES:
1. Discipline: Discharge 7:3542
2. Procedural Requirements and the Power to Discipline 7:2100
3. Disciplinary Penalties 7:4000
4. Fighting, Assault 7:3430

DECISION RENDERED: November 21, 1988
(Related Award - September 16, 1988)

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: This interim award arose over a dispute regarding the dismissal of the Grievor. The Grievor was dismissed by the Employer because of complaints of sexual harassment. The Union submitted that the Grievor was unjustly disciplined because she was dismissed without first being suspended, contrary to the provisions of the collective agreement.

The Union argued that article 23.1 of the collective agreement provided for a progressive disciplinary process, requiring the Employer to provide verbal warnings, followed by a written reprimand, suspension and, ultimately, dismissal. The Union argued that these are substantive, not procedural, rights that are granted to all employees. The Union acknowledged that article 23.2 provided that notice of warning need not be provided in cases of severe problems, such as sexual harassment. However, the Union contended that this only eliminated the requirement for notice of warning, not the need for suspension prior to dismissal.

The Employer argued that article 23.2 should be given its plain and simple meaning. It submitted that there existed situations where dismissal would be the only appropriate remedy. It was the position of the Employer that Article 23.2 gave it the right to suspend or dismiss in the specified cases set forth.

AWARD: The Union application was dismissed and the Arbitrator ordered that the grievance was to be heard on its own merits. In certain circumstances, the Arbitrator ruled it may be appropriate to suspend or dismiss without warning. In so ruling, the Arbitrator noted that the language of the collective agreement was clear, and the requirements of article 23.1 did not apply to the offences listed in article 23.2.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-11-010

EMPLOYER: Motor Coach Industries Ltd.

UNION: International Association of Machinists and Aerospace Workers, Lodge 1953

ARBITRATOR: J.M. Chapman, Q.C.

APPEARANCES: J. Scurfield, for the Employer
L. Paulson, for the Union

ISSUES:
1. Discipline: Warning 7:3542
2. Insolent, Unco-operative Behavior, Obscene Language 7:3660
3. Refusal to Follow Instructions 7:3610
4. The Collective Agreement: Company Rules 4:1500

DECISION RENDERED: November 23, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Employer instituted a policy requiring all employees to produce an identification badge to gain entry to the job site. According to a security guard, the Grievor initially refused to show him his badge, verbally abused the guard and then quickly displayed the card, preventing it from being examined. As a result of this incident, the Grievor received a written warning. The Grievor denied swearing at the guard and said that he never attempted to withhold his identity from the guard. He argued that the usual procedure was to merely flash the card at the guard house to gain entry. The Union submitted that the identification procedure was not carried out consistently, and claimed that the Grievor was unjustly disciplined.

The Employer argued that it had instituted the policy for valid reasons and had made its rules known to all employees. It was suggested by the Employer that the dispute boiled down to a question of credibility. The Employer claimed that the security guard had no motive for lying as he no longer was an employee.

AWARD: The grievance was denied. Accepting the evidence of the Employer, the Arbitrator found that the Grievor did not obey the letter or the spirit of the rule. The entire matter, it was emphasized, could have been resolved if the Grievor would have accommodated the security guard's request. The discipline imposed, the Arbitrator noted, was of a minor nature, being only a written warning.

AUTHORITIES: None cited.

FILE NO. AA88-11-011

EMPLOYER: Motor Coach Industries Ltd.

UNION: International Association of Machinists
and Aerospace Workers, Lodge 1953

ARBITRATOR: J.M. Chapman, Q.C.

APPEARANCES: J. Scurfield, for the Employer
L. Paulson, for the Union

ISSUES:
1. Discharge: Warnings 7:3542
2. Refusal to Follow Instructions 7:3610
3. Insubordination 7:3600

DECISION RENDERED: November 28, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: According to the Employer, a supervisor noticed that the Grievor was not wearing his safety glasses contrary to company policy. The supervisor asked why the Grievor was not wearing his glasses. The Grievor did not answer the supervisor's question, refused to put on his glasses and engaged in a shouting match with the supervisor. As a result of the Grievor's refusal to obey the direct order, he received a verbal warning, a record of which was placed in his file. The Employer emphasized that the disciplinary action was taken only for the insubordination and not the ensuing verbal abuse.

The Union filed a grievance alleging improper discipline. It argued that the order was not clear. As well, it submitted that the Employer did not establish that the Grievor failed to comply with the request. It also suggested that the rule was not uniformly followed by all employees. The Grievor testified that he was wearing the glasses on the day in question but that they had fallen off because a wall panel he was working on had just fallen on him.

AWARD: The grievance was denied. The Arbitrator ruled that the Grievor was guilty of insubordination. The rule in question was lawful, reasonable and in the employees' best interests. The Grievor was given an opportunity to comply with the rule, was then ordered to do so, but still refused to comply. As it was the duty of the Grievor to comply with the supervisor's order, any refusal must be considered insubordination. The Arbitrator noted that if the Grievor was unhappy with the order, he should have complied and then filed a grievance.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-11-012

EMPLOYER: New Flyer Industries

UNION: Canadian Association of Industrial, Mechanical and Allied Workers, Local 3

ARBITRATOR: J.M. Chapman, Q.C.

APPEARANCES: K. Lercher, for the Employer
S. Spratt, for the Union

ISSUES:
1. Organization and Direction of the Workplace: Compliance with the Wage Structure 5:2400
2. Criteria: Equal Work or Equal Skill 5:2420
3. Revision of Classification and Rates 5:2440
4. Procedural Requirements 5:2500

DECISION RENDERED: November 29, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, classified as a Painter-Helper, claimed that he was performing the job of a Painter and sought reclassification. The Grievor had worked for the Employer for over 15 years. For the past five years, he was classified as a Painter-Helper, responsible for the priming of parts. For a short period of time, he was upgraded to the Painter classification. Subsequently, he was returned to his previous position as a Painter-Helper. The Employer agreed to provide a test to determine if the Grievor met the technical qualifications of a Painter. However, the Grievor failed the test, leading to the grievance.

In its submission, the Union noted the provisions of the collective agreement, which stated that workers shall be automatically progressed to the higher classification upon completion of fifteen months employment, providing they meet the technical qualifications of the higher classification. The Union emphasized that the Employer agreed in the collective agreement to provide training which would allow employees to progress in the organization. The Union submitted that the Grievor received no formal instruction on the job. Workers classified as Painters testified that there was no difference between the two job classifications. Finally, the Union argued that the onus was on the Employer to show that the Grievor was not qualified for the job, a requirement which it failed to fulfill.

The Employer argued that, as the Grievor failed the technical requirement, he was not entitled to reclassification. The Employer emphasized that the Grievor had been responsible only for the priming of parts. The job requirements of the Painter classification were much more demanding, involving painting and finishing. Furthermore, the job required the Grievor to be able to read blueprints and follow instructions that accompanied every part. The Employer submitted that the Grievor, who could not read or write English, could not meet the requirements of the job. The Employer said that there was no formal training for the position as all workers merely learned while on the job. As well, the Employer noted that the Grievor's work was not satisfactory while employed for a short time at the higher classification.

AWARD: The grievance was denied. The Arbitrator held that the onus rested with the Grievor to show that he was performing the higher classified work, an onus which was not satisfied. In making his decision, the Arbitrator emphasized that the Grievor failed all aspects of the test provided, thereby disentitling himself to any reclassification. Finally, it was held that the on the job training provided by the Employer was sufficient for the position in question.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-12-001

EMPLOYER:	Manfor Ltd.
UNION:	International Woodworkers Of America, Local I-324
ARBITRATOR:	W.D. Hamilton
APPEARANCES:	G. Sigurdson, Q.C./J. Palamar, for the Employer R. Tonn, for the Union
ISSUES:	1. Jurisdiction of the Arbitrator: Arbitrability: Prior Award 2:3220 2. Seniority: Senior Employee with the Required Ability 6:3210 3. Ability and Qualifications Criteria 6:3300 4. Education and Experience 6:3320 5. The Collective Agreement: Ancillary Documents 4:1200
DECISION RENDERED:	December 9, 1988
EXPEDITED ARBITRATION:	No

CIRCUMSTANCES: The Employer raised a preliminary objection to the Arbitrator's jurisdiction. It argued that the Union was prevented from advancing the grievance, because the Union's interpretation of the word "able" was similar to that which appeared in a previous award which had been quashed. The Arbitrator ruled that the points raised went to argument rather than arbitrability.

The Grievor, who was an Oiler in the Lumber Division, applied for, but was denied the position of Millwright, which was awarded to a more junior employee. The Union filed a grievance alleging that the Employer had violated article 18.01(d) of the collective agreement, which required that the most senior applicant be awarded a position provided he was "able to perform the work."

The Employer asserted that the Grievor was not "able" to perform the job, because he was not a "ticketed" Millwright, and he did not have any related experience. It also argued that Schedule E to the collective agreement sanctioned the requirement of a "ticket", and "able" was to be read in that context. In addition, it submitted that the successful applicant, although he was not a ticketed Millwright, was awarded the position as per a special agreement between the Union and itself, which was outlined in a letter dated November 28, 1983. In response, the Union contended that the Employer misunderstood the agreement. It argued that the letter only preserved the seniority of the incumbent, and did not grant him superior rights in terms of seniority. Because article 18.01 was a threshold clause, then the Grievor was entitled to the position as he was able to do the job, and was entitled to prove his capabilities in a trial period.

AWARD: The grievance was denied. The Arbitrator ruled that the letter and Schedule E were ancillary documents to the collective agreement. Therefore, when these documents were considered with article 18.01, the Arbitrator found that the Employer did not violate the collective agreement by establishing the requirement for a "ticket", or by fulfilling the terms of the letter in awarding the position to the successful candidate. Although the incumbent, like the Grievor, was not a certified millwright, his status was grandfathered in trade by the collateral agreement as outlined in the letter.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-12-002

EMPLOYER: The City of Winnipeg

UNION: Winnipeg Police Association

BOARD: J.M. Chapman, Q.C., Chairperson
G.D. Parkinson, Nominee for the Employer
P.S. Teskey, Nominee for the Union

APPEARANCES: M.S. Samphir, for the Employer
A.R. McGregor, Q.C., for the Union

ISSUE: 1. Interest Arbitration 1:0000

DECISION RENDERED: December 9, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The parties entered into extensive bargaining to negotiate the renewal of their collective agreement which was applicable for both the police and staff sectors. The Employer proposed that: the term of the agreement should be for a minimum of three years; the minimum payment for court time on weekly leave be reduced from eight to four hours, and the time for notice of cancellation of a hearing be reduced from twenty-four to fifteen hours; the collective agreement and the Promotion Booklet be amended to restrict application to those classifications covered by the Pay

Schedule and Association's Certification; the article covering two-man cruiser cars be amended to provide for one-man cruiser cars under certain circumstances; the starting salary of Staff Sergeants, and Sergeant I and II positions be lowered; and, the credit for statutory holiday leave be based on a maximum of eighty-eight hours. The Union proposed that: the term of the agreement be for a two year period; the Employer should provide the dental plan as per the 1989 fee schedule; amendments be made to the vacation schedule; the rate for overtime should be time and a half for the first two hours and double time thereafter, but overtime relating to court appearances after the late shift should be double time for all hours worked; wages should be increased by varying percentages four times during the term of the agreement; the night shift premium for both sectors be increased by fifty cents; and, the article pertaining to the post retirement two-thirds survivor's pension be amended to reflect no reduction in the member's pension.

The Employer argued that the salary increase and the changes to the working conditions of the two sectors should reflect the changes made for the "members within the same community", that is, other employee groups of the Employer. It emphasized that those terms and conditions contained in those agreements reflected a "community standard." It objected to the Union's comparison of the salaries of police officers in other jurisdictions.

AWARD: The Board held that the term of the agreement should be for the two year period commencing January 24, 1988 and ending January 20, 1990. The Board accepted the Union's proposal for the dental plan, determined the vacation leave to be granted, denied the Union's proposal on overtime, and granted its proposed amendments to the article pertaining to the pension. The Board denied the increase to the night shift premium for the police sector, because a premium was already received and shift work was an integral part of the operations of the Department. However, it granted a increase of five cents for the first year and ten cents for the second to the premium paid to the staff sector. In determining the salary issue, the Board considered the comparability with police officers in other Canadian cities of similar size, but also the general salary settlements with other employee groups of the Employer, and taxpayers "ability to pay." The Board found that the Police were underpaid and ordered wage increases of 2.5% semi-annually for the first year, and 1.75% semi-annually for the second year. It awarded an annual increase of 3% for the staff sector, due to the lower degree of risk and stress in its positions as compared to those in the police sector.

The Board accepted the Employer's request to reduce the minimum payment for court time on weekly leave and the amendments to the notice of cancellation. However, it denied the amendments related to "promotion" and "jurisdiction", the adjustments of maximum hours credit for statutory holidays, and the reduction of the starting salary for

Sergeants. The Board was not satisfied that the Employer had proven its capacity to provide for high speed backup units, and therefore it would not allow the amendment to the provision for two-man cruiser cars. However, it did amend the provision pertaining to report cars, by allowing two cars instead of one.

DISSENT: G.D. Parkinson, Nominee for the City. Dissent in part, reasons were not submitted.

P.S. Teskey, Nominee for the Union. Mr. Teskey disagreed with the amendments made to the provision for the report cars. He stated that the Board did not have the day-to-day knowledge of the operations needed to make an informed decision. He did not believe that the Board had sufficient information to fully understand the effects of the amendment and he was not satisfied that adequate discussion of the issue had taken place. In addition, he would have awarded an increase to the night shift premium for the police sector, because the inconvenience of working that shift was the same as for all other groups employed. He disagreed with the changes to the minimum pay for court time on weekly leave. Finally, he would have awarded an additional 1% to the classifications in the Communication Centre as these individuals experienced an increase in their workload and productivity.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-12-003

EMPLOYER:	The City of Winnipeg
UNION:	The Canadian Union of Public Employees, Local 500
ARBITRATOR:	W.D. Hamilton
APPEARANCES:	M. Samphir/M.E. Cavett, for the Employer R. Tonn, for the Union
ISSUES:	1. Compensation: Disability Benefits 8:3320 2. Discipline: Inability to Discharge Employment Obligations 7:3220
DECISION RENDERED:	December 15, 1988
EXPEDITED ARBITRATION:	No

CIRCUMSTANCES: As a result of a back injury, the Grievor, who was a Technician I, was off work and received Workers' Compensation Benefits. When his benefits were terminated after five years, he remained off work by using his accumulated sick days and holiday credits. He then applied for disability benefits with the Employee Benefits Board. Based on medical evidence, he was found to be not totally or permanently disabled and was only awarded 25% of total disability benefits. It also recommended that the Grievor inquire about rehabilitative employment. The Employer offered him the opportunity to attend a training program and a number of potential employment opportunities which were compatible with his physical limitations. However, the Grievor declined all the offers. As a result of his refusal, his benefits were terminated. Four months later, he advised the Employer that he wanted to return to work. The Employer informed the Grievor that because of his "position with respect to retraining and refusal to work", it was determined that he had, in effect, terminated his employment relationship.

The Union filed a grievance alleging that the Employer erred in concluding that the Grievor had "quit." It argued that, although the Grievor was aware his benefits would be severed, he was never informed that his failure to return to work placed his employment status in jeopardy. As well, it submitted that he had never said anything which could be inferred as an intention to quit. Therefore, because there was no subjective intention to quit, the Employer could not draw any inferences from his actions.

AWARD: The grievance was allowed. The Arbitrator did not accept the Union's assertion that there must always be an expressed intention to "quit" before an arbitrator had the right to find a "quit." A subjective element does exist, and therefore an employee's conduct could be interpreted as a desire to quit. However, he emphasized that an employer who infers an intention to quit from conduct alone, faces a heavy onus to prove intention. As well, the Arbitrator found that the termination of the disability benefits did not sever the employment relationship. However, he found that the evidence was inadequate of the arbitral standards which would allow the Employer to infer a subjective intent to quit. Therefore, he ruled that the Grievor did not quit.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-12-004

EMPLOYER: The Province of Manitoba

UNION: Manitoba Government Employees' Association

ARBITRATOR: D.G. Baizley, Q.C.

APPEARANCES: C. Hill, for the Employer
L. Morriseau, for the Union

ISSUES:
1. Discipline: Discharge 7:3542
2. Insufficient and/or Careless Work 7:3520
3. Fighting, Assault 7:3430
4. Rehabilitative Potential 7:4422
5. Economic Hardship 7:4426
6. Jurisdiction of the Arbitrator: Reinstatement and Substitution of Penalty 2:1470

DECISION RENDERED: December 15, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, a Registered Psychiatric Nurse, was discharged because of alleged misconduct and maltreatment of patients, and because she had failed to perform her share of the work. The Union filed a grievance claiming that the dismissal was unjust. It conceded that the Grievor had not done her fair share of work on the weekend in question. However, it denied the allegations regarding the abuse of patients.

AWARD: The grievance was allowed in part. The Arbitrator found that, at times, the Grievor exercised poor judgment in her treatment of patients, and she had occasionally demonstrated an unsympathetic and insensitive attitude towards the patients, which amounted to abuse. He ruled that the discharge was too harsh a penalty in consideration of the Grievor's unblemished employee record, her positive performance evaluations, her rehabilitative potential, and of the conflicting evidence presented. He also considered the negative effect a dismissal would have in terms of the Grievor's career as a psychiatric nurse. Therefore, he ordered that the dismissal be substituted with a seven month suspension without compensation or benefits.

AUTHORITIES: Numerous authorities were cited in the award.

FILE NO. AA88-12-005

EMPLOYER: City of Brandon

UNION: Canadian Union of Public Employees, Local 69

ARBITRATOR: J. Cooper

APPEARANCES: R.W. Singleton, for the Employer
J.P. Janzen, for the Union

ISSUES:
1. Seniority: Recall of Persons on Lay-off 6:2350
2. Senior Employee with the Required Ability 6:3210
3. Acquisition and Termination 6:1000
4. Organization and Direction of the Workplace:Temporary, Casual and Part-time Employees 5:1124
5. Employee Defined 5:1122
6. The Collective Agreement: Management's Duty to Act Fairly 4:2320
7. Jurisdiction of the Arbitrator: Arbitrability: Abandonment, Settlement and Withdrawal 2:3230

DECISION RENDERED: December 20, 1988

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: On January 18, 1988, the Grievor, who was hired six months earlier under a provincial government work experience program, was hired directly by the Employer to work as a Case Worker for "a probable duration of one month." While still employed under the work experience program, she applied for the position of Intake Worker. She was not offered the position, but the candidate who was offered the job rejected the offer. The Union filed a grievance claiming that the Grievor should have been awarded the position because of her seniority. At the same time, the Employer offered the position to another applicant who was the incumbent, but only on a temporary basis due to the pending grievance. On February 19th, the Grievor was laid off and placed her name on the recall list. On February 23rd, the Employer informed the Union that it was denying the grievance, because when the position was posted internally, January 5th-13th, the Grievor was not an employee. The Union conceded and withdrew the grievance. In the meantime, The Province of Manitoba announced its intention to assume responsibility of the social assistance program. To avoid potential problems with bumping rights if the position was made permanent, and then deleted, the Employer decided to fill the position on a term basis. When informed of the Employer's intentions, the Union acknowledged that a grievance would be filed. To avoid the grievance, the Employer decided to leave the position as permanent and the incumbent was offered it on that basis. In spite of the Employer's attempts to avoid a grievance, the Union filed one anyways claiming that the Grievor should have been offered the position, because she was on recall, had seniority, and possessed the necessary qualifications.

The Employer raised a preliminary objection to jurisdiction, because, as the first grievance was withdrawn, any further grievance on this matter was already settled. As well, the Employer questioned the arbitrability of the matter, because the Grievor was not an employee when the competition was posted. Also, the Grievor had no seniority at the time of the grievance, because she had not worked the number of hours specified in clause 5(a) of the collective agreement. As to the merits of the case, it contended that the Grievor was not entitled to the position, because she was classified as a Case Worker, and therefore, did not possess the qualifications or the experience needed for the Intake Worker position.

The Union conceded that the Grievor was not an employee at the closing date of the competition, but it maintained that that date was not the relevant one to consider. It submitted that the position posted in January was not filled, and that a new temporary position was established in March. At that time, the Grievor was an employee on the recall list. If the Arbitrator found that a temporary position was not created in March, then the Union submitted that the collective agreement was violated because the Employer's motive for keeping the position permanent were not in good faith. It suggested that the Employer did not change the status, because it knew the Grievor would be entitled to the position if it were temporary. The Union also argued that clause 5(a) only pertained to the application for permanent positions, and therefore, a temporary employee could apply for temporary jobs with no restriction on the number of hours worked. Finally, the Union argued that the Grievor was qualified for the position, because the duties of the Case Worker and the Intake Worker were substantially the same.

AWARD: The grievance was allowed in part. The Arbitrator found that the objection of res judicata was groundless, because, first, the first grievance was never adjudicated, and secondly, the grievances arose from different, although related facts. She also found that a new and temporary position was created in March and that at that time, the Grievor was an employee. She agreed with the Union's argument on clause 5(a), and ruled that the Grievor, who was a temporary employee at the relevant time, had the necessary seniority to be eligible for recall to a temporary position. However, although the Arbitrator could not find any substantial difference between the two positions, the collective agreement referred to the positions as two different classifications. Therefore, the Grievor did not have experience as an Intake Worker, and the Arbitrator ruled that she was not entitled to the position. In addition, she found that the Employer altered the status of the position to circumvent the provisions of the collective agreement and to avoid the possibility of appointing the Grievor. Therefore, she ruled that the Employer violated article 207 because it failed to act fairly, reasonably and in good faith. Although the Grievor was not entitled to the position, the Arbitrator believed she should be compensated for the Employer's breach of the agreement. Therefore, she ordered that the Employer pay the Grievor the equivalent of two months' salary at the rate she would have earned if she had been awarded the position.

AUTHORITIES: None cited.

FILE NO. AA88-12-006

EMPLOYER: Manfor Ltd.

UNION: Canadian Paperworkers Union, Local 1403

ARBITRATOR: M.H. Freedman, Q.C.

APPEARANCES: R. Roy, for the Employer
M. Myers, Q.C./V. Matthews-Lemiuex,for the Union

ISSUES:
1. Organization and Direction of the Workplace: Allocation of Overtime Within the Group 5:3224
2. Scheduling Work: Voluntary or Compulsory 5:3210
3. The Collective Agreement: The Object of Construction 4:2100
4. Management Rights 4:2310

DECISION RENDERED: December 22, 1988

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: As per the collective agreement, the plant shut down for forty-eight hours to observe Christmas and Boxing Day. Production was to resume at 8:00 p.m. on December 26th. The crew members who were scheduled to work, were told to come in four hours early. Two millwrights, one with seventeen years of seniority, the other with sixteen, did not want to work that shift. The two Grievors, who were millwrights with fourteen years of seniority each, volunteered to work, but the Employer denied their request. The Union filed a grievance claiming that the Grievors should have been requested to work as per the overtime provisions of section P3.01(a), which outlined that employees with the least overtime would be scheduled first. It argued that this situation fell under section P3.01(b) of the collective agreement, and that the crew was "an early startup crew", and should have been manned on a voluntary basis.

The Employer contended that section P3.01(b) did not apply , because the crew was not scheduled "to effect repairs that would otherwise delay the resumption of production." In addition, it argued that the crew was not working overtime, but had simply started their shift early. It stated that as per the Management's Rights clause, it had the right to request employees to work, and the Union had agreed that the crew would come in early.

AWARD: The grievance was allowed in part. The Arbitrator found that section P3.01(b) did not apply as no repairs were required that would delay the resumption of production. However, he found that the two Millwrights scheduled were told, rather than requested, to come in early. As these men were not compelled to work from 4 p.m. to 8 p.m. on Boxing Day, then P3.01(a), which required the observance of the shutdown until 8:00 p.m., was breached. However, the evidence was unclear on whether the overtime roster should have been utilized, and whether the Grievors should have received the opportunity to work. Therefore, the Arbitrator ruled that the Employer had violated the collective agreement and reserved the jurisdiction in connection to damages.

AUTHORITIES: None cited.

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